Supreme Court, U.S.
FILED
SEP 7 - 2000
CLERK

Nos. 99-1864 and 99-1865

In the

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al.*,

Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

JOINT APPENDIX
Volume II of II
(pages 483 through 823)

[Counsel listed on inside front cover]

APPEAL DOCKETED MAY 23, 2000
PROBABLE JURISDICTION NOTED JUNE 26, 2000

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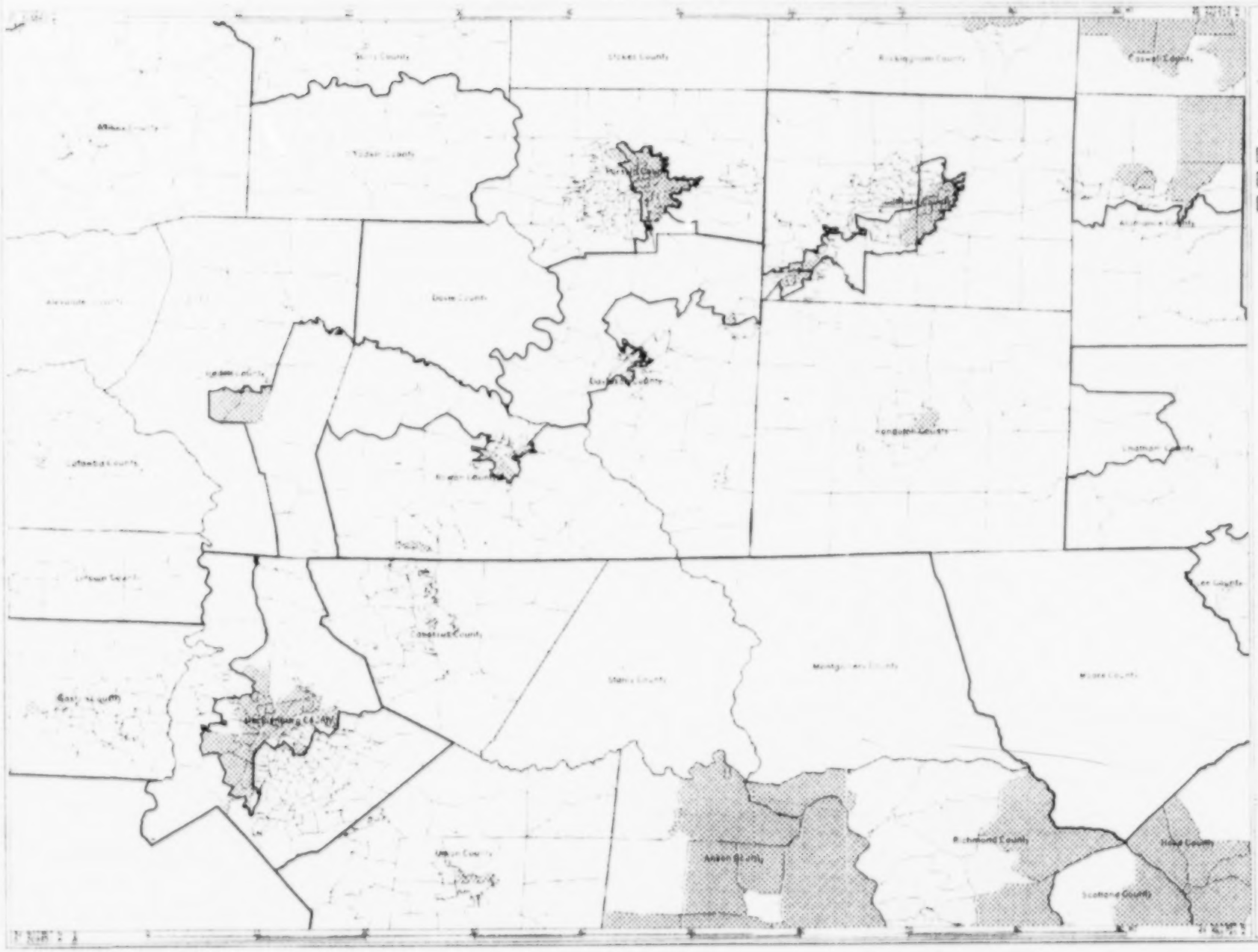
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Precincts by Percent of Population Black with Congressional District Line Overlay

March 17, 1998



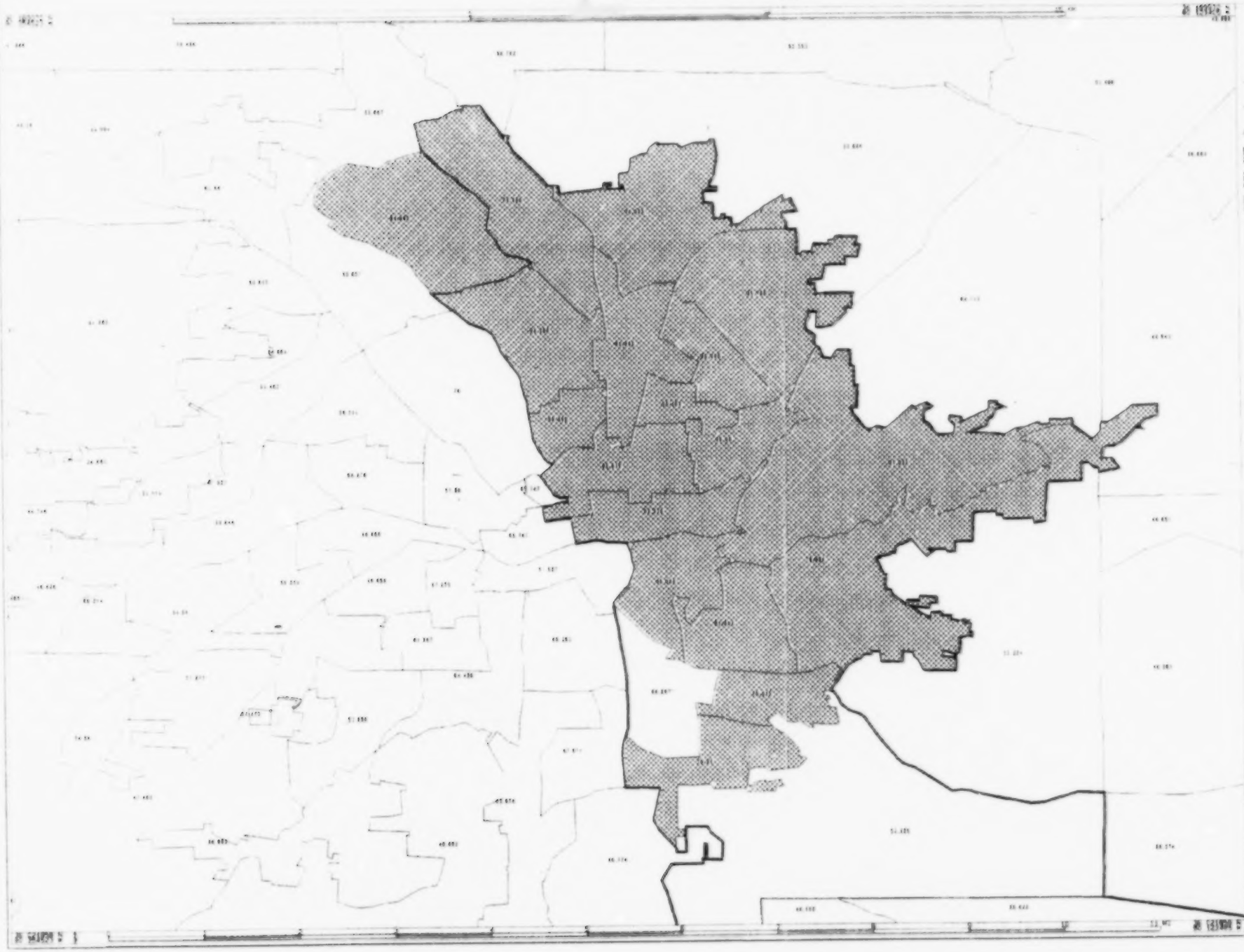
N.C. General Assembly
Legislative Services Off.
Redistricting System
Software Copyright 1990
Public Systems Associates

JOINT EXHIBIT

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Forsyth Precincts by Percent of Population Black with Democratic Registration Values

March 18, 1998

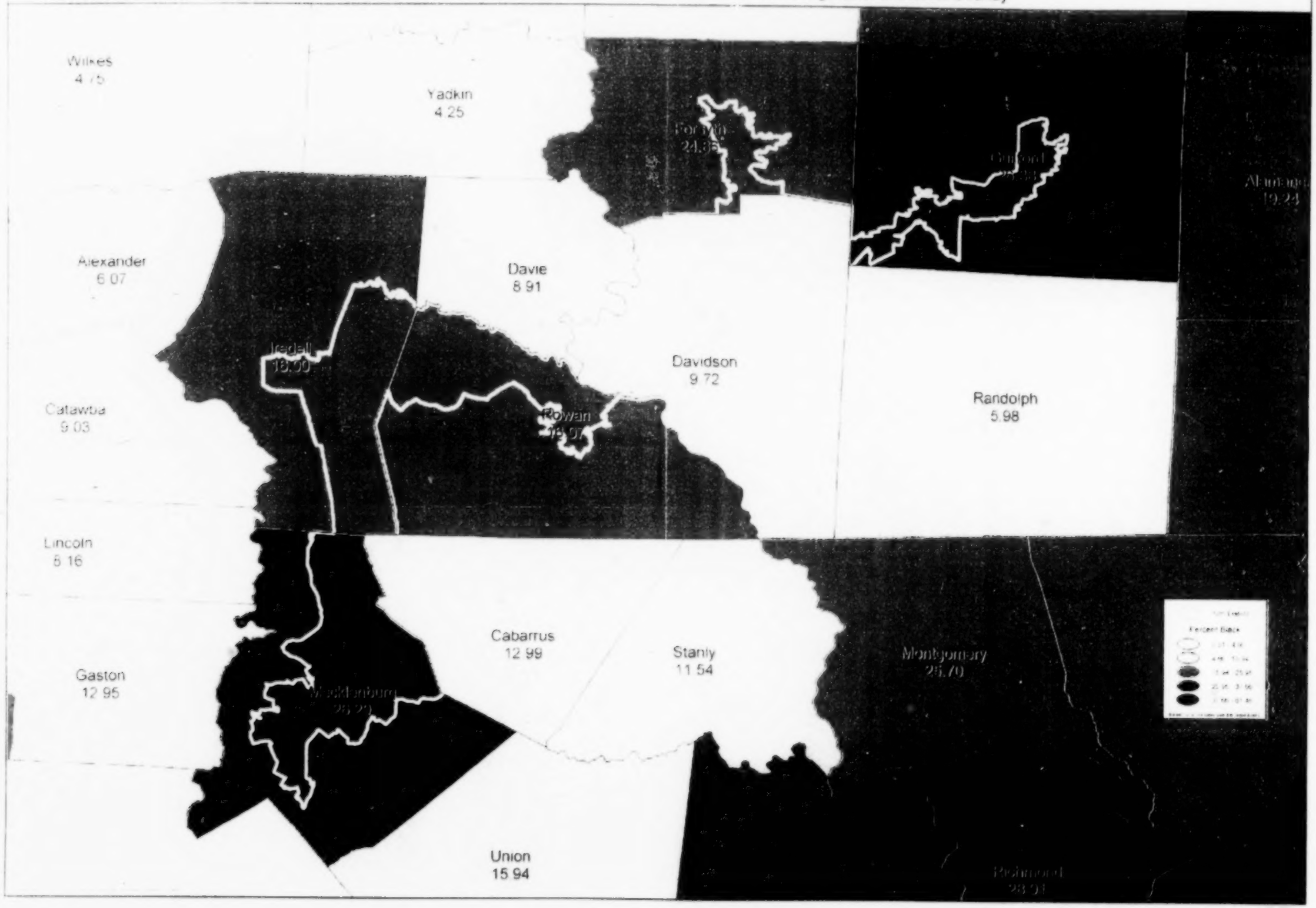


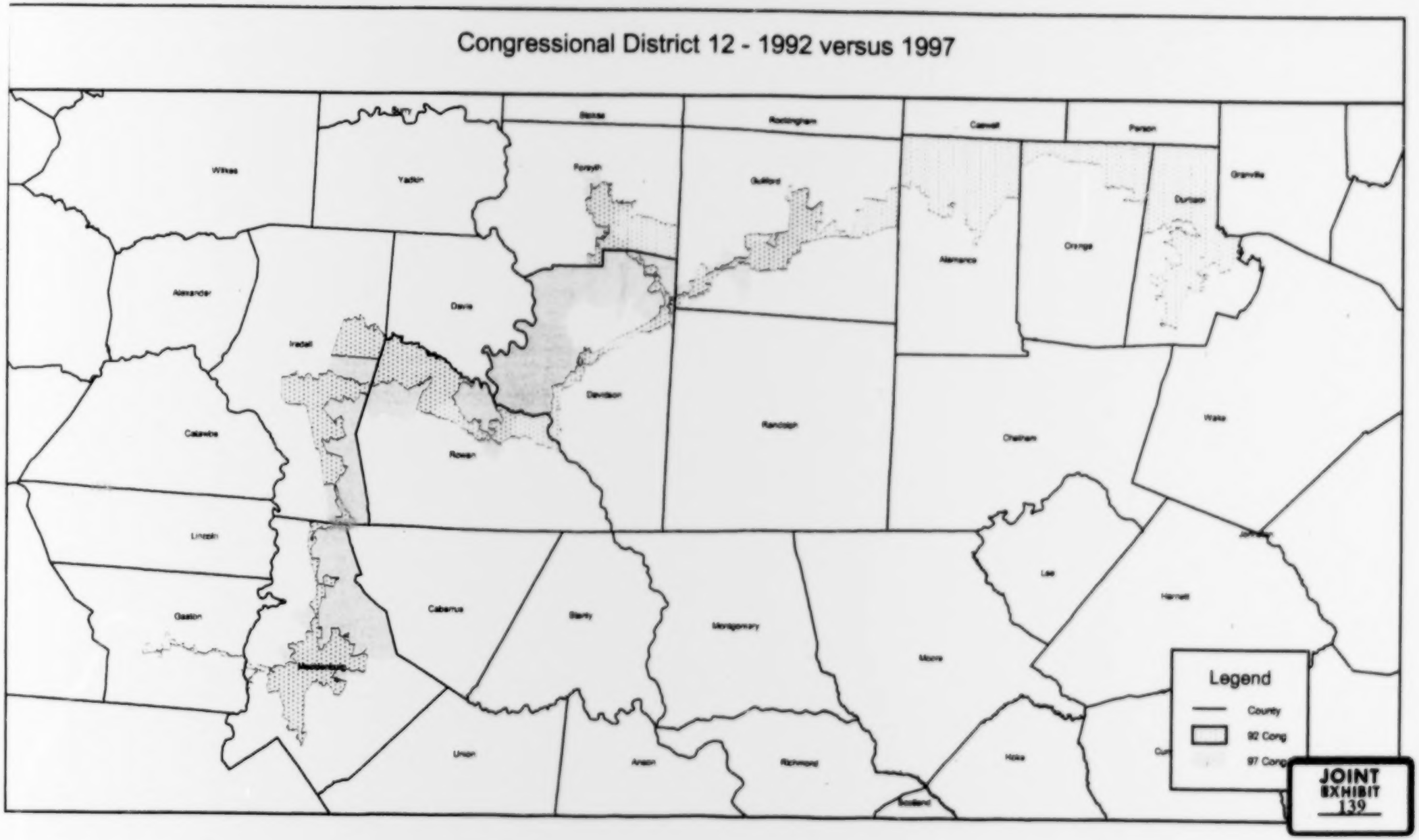
LEGEND

- County Boundary
- VTD Boundary
- Dist. Boundary (C004)
- 0 - 35 Percent Black
- 35 - 40 Percent Black
- 40 - 100 Percent Black

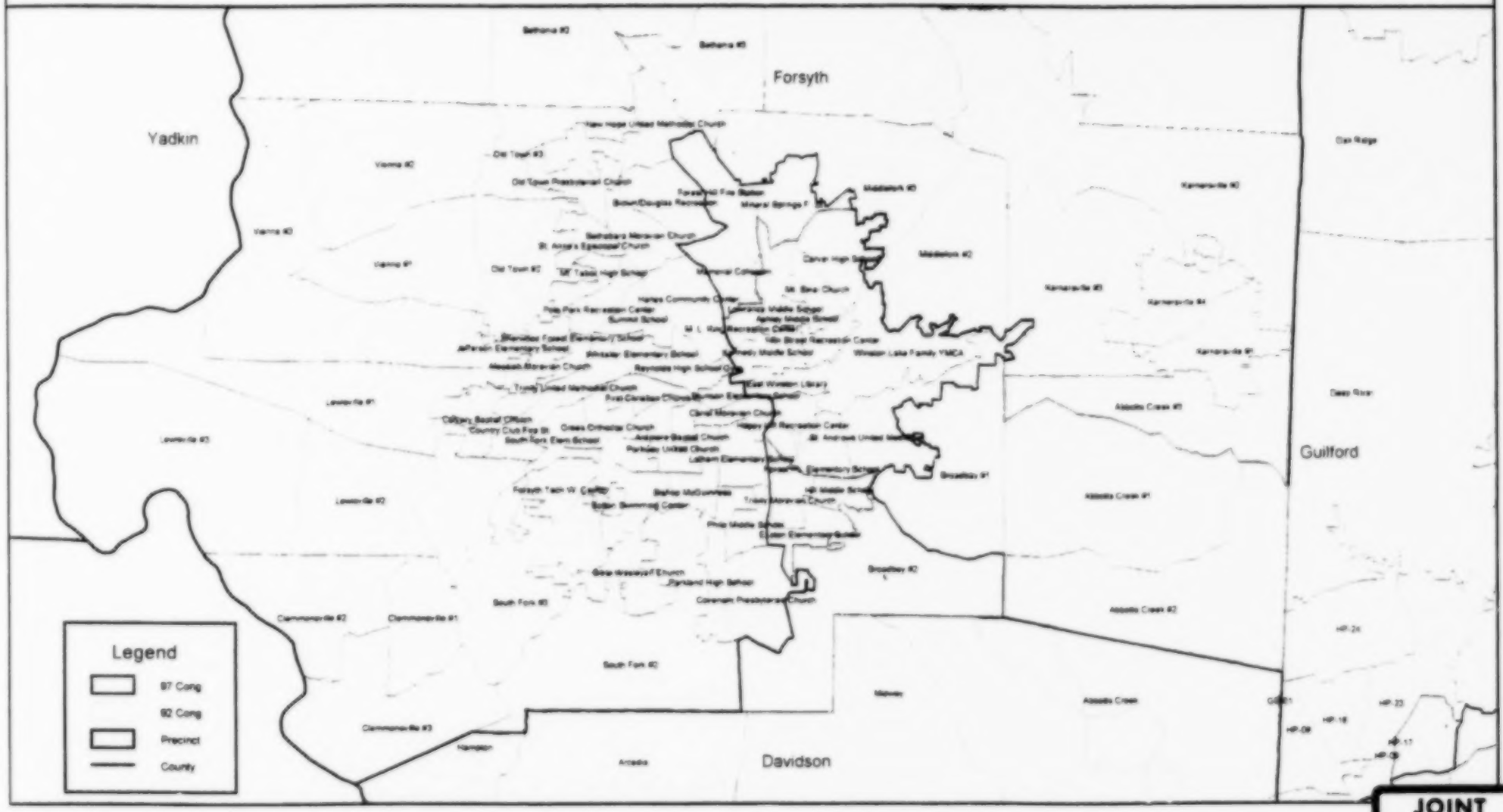
N.C. General Assembly
Legislative Services Ofc.
Redistricting System
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North Carolina Counties by Percent of Population Black with 12th Congressional District Overlay



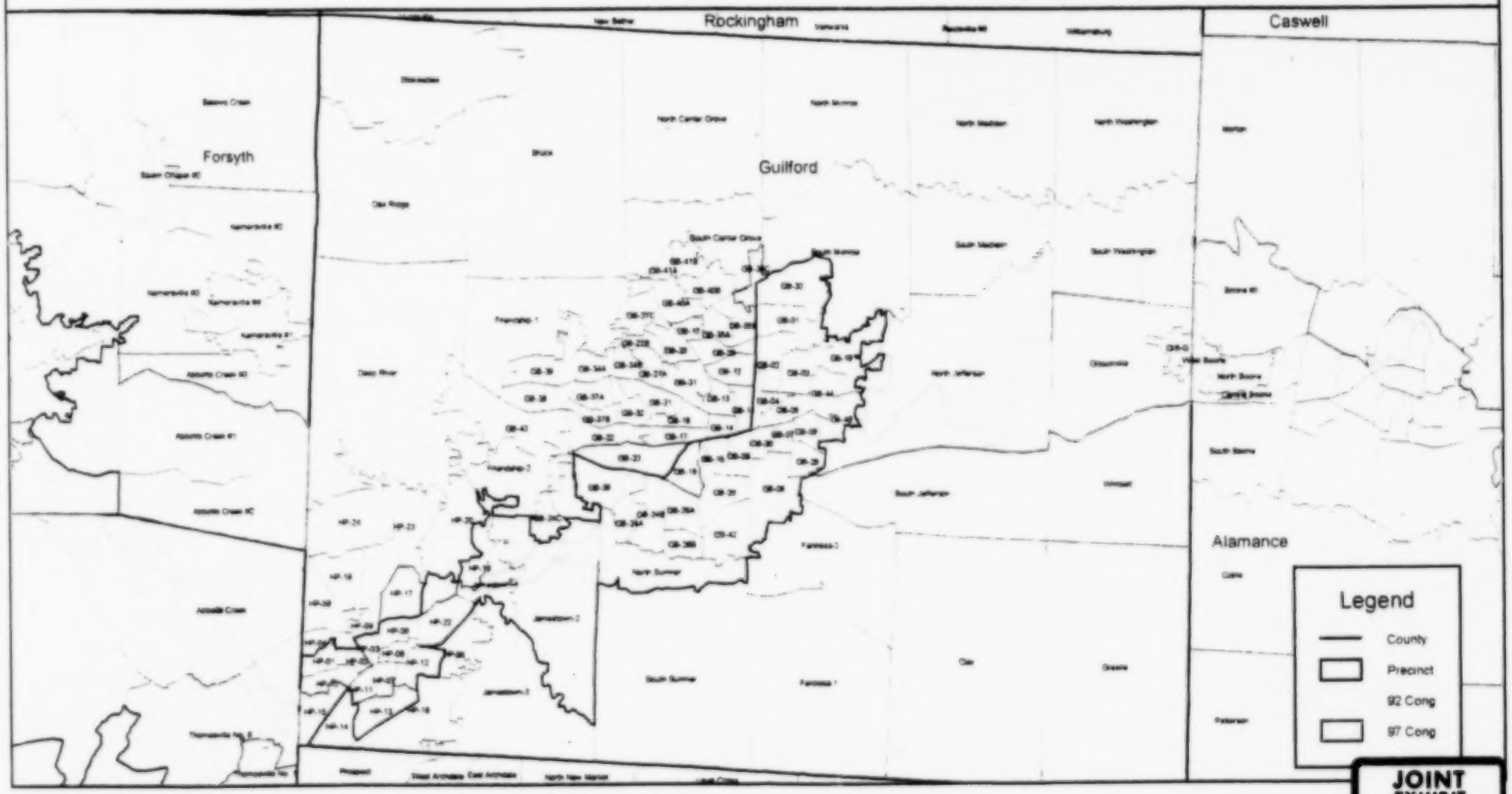

Congressional District 12 - 1992 versus 1997
Wilkes
Yadkin
Forsyth
Stanly
Rockingham
Caswell
Person
Alamance
Orange
Durham
Granville
Alexander
Iredell
Davie
Davidson
Randolph
Chatham
Wake
Catawba
Rowan
Lincoln
Gaston
Cabarrus
Union
Anson
Richmond
Montgomery
Moore
Lee
Harnett
Hoke
Scotland
Legend
County
92 Cong
97 Cong
JOINT EXHIBIT 139

Forsyth County Precinct Map



JOINT EXHIBIT 143

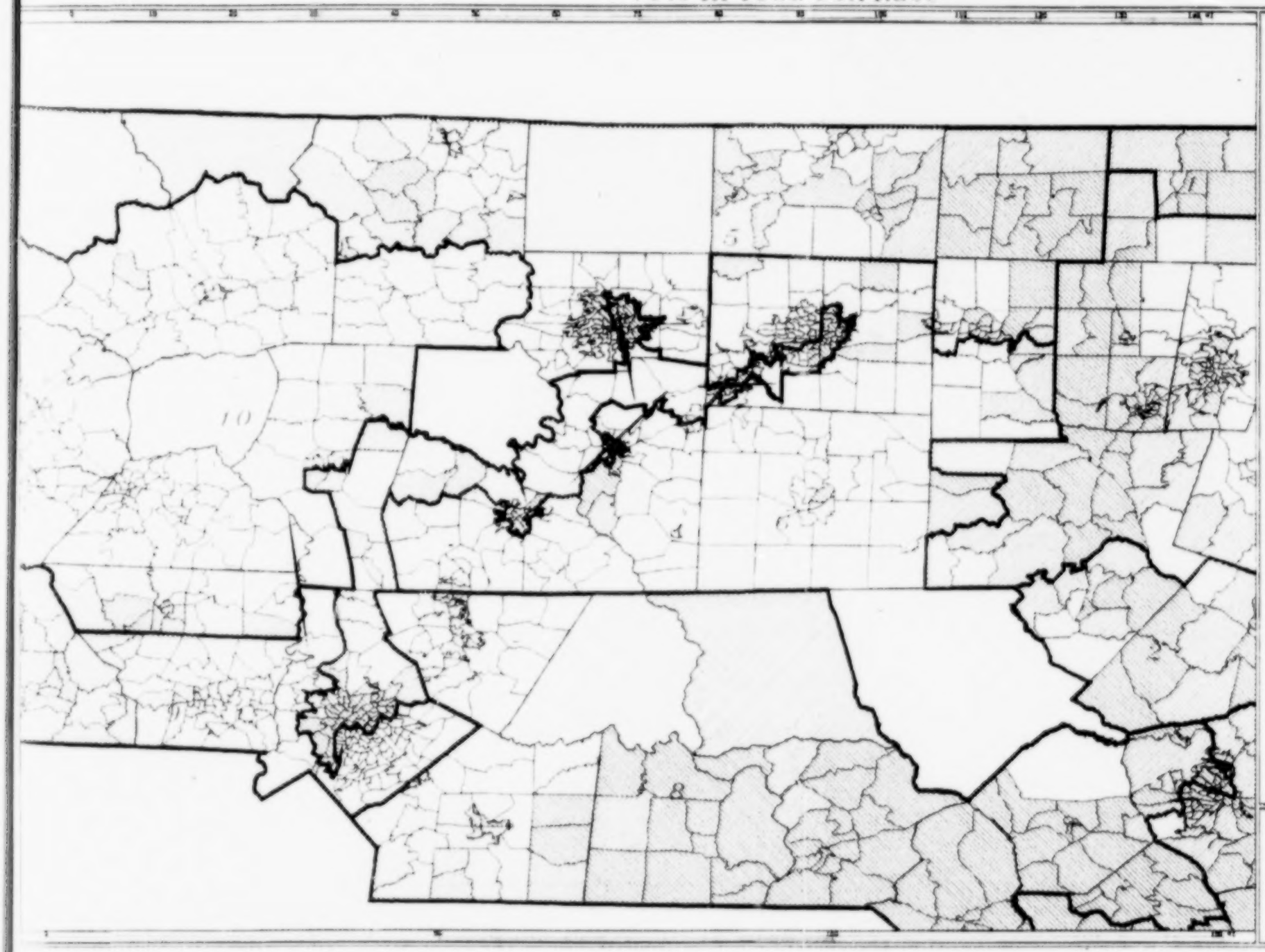
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1997 Congressional Plan – District 12
Region Precincts by Percent Democrat Vote in 1988 COA Race

September 7, 1999

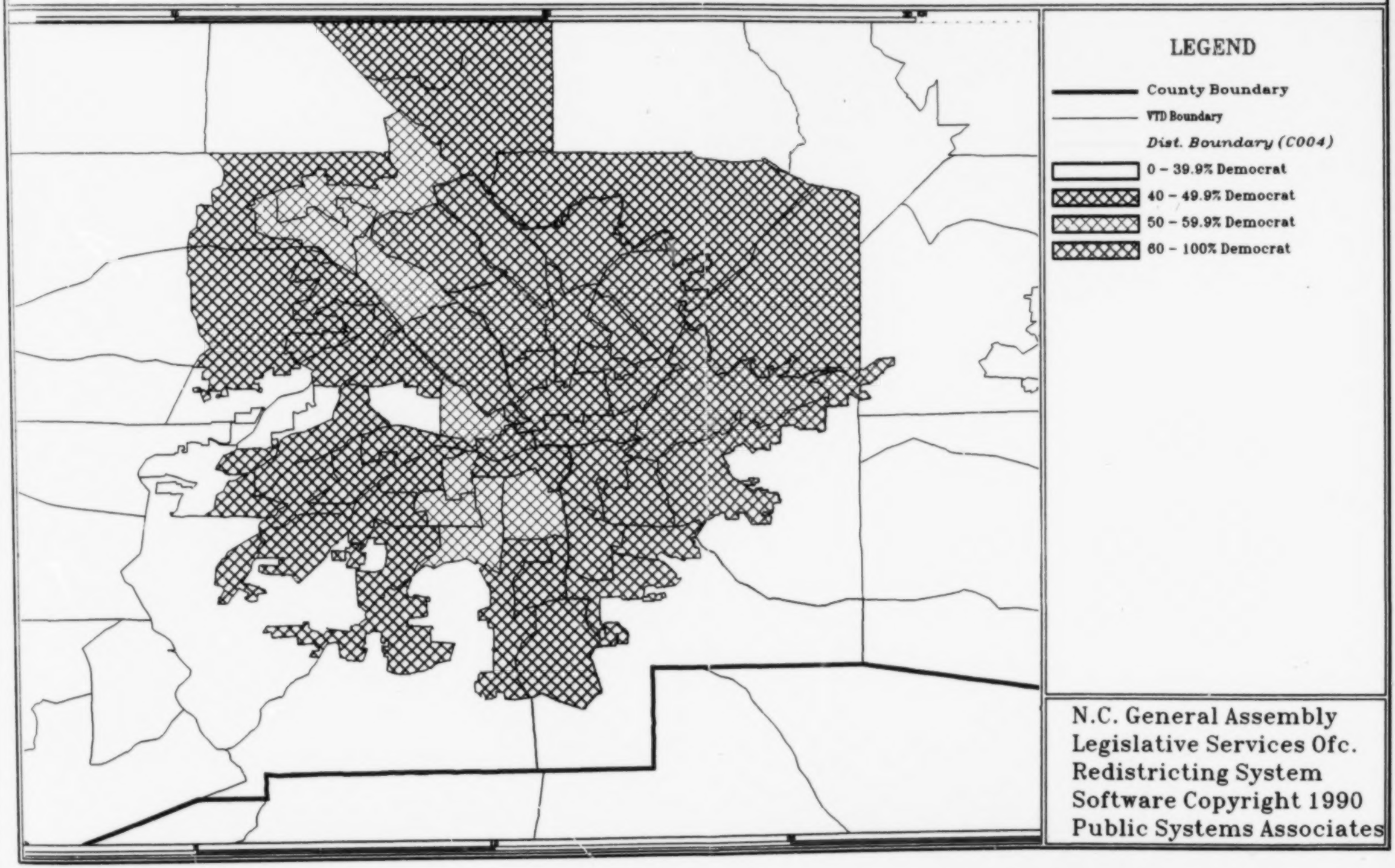


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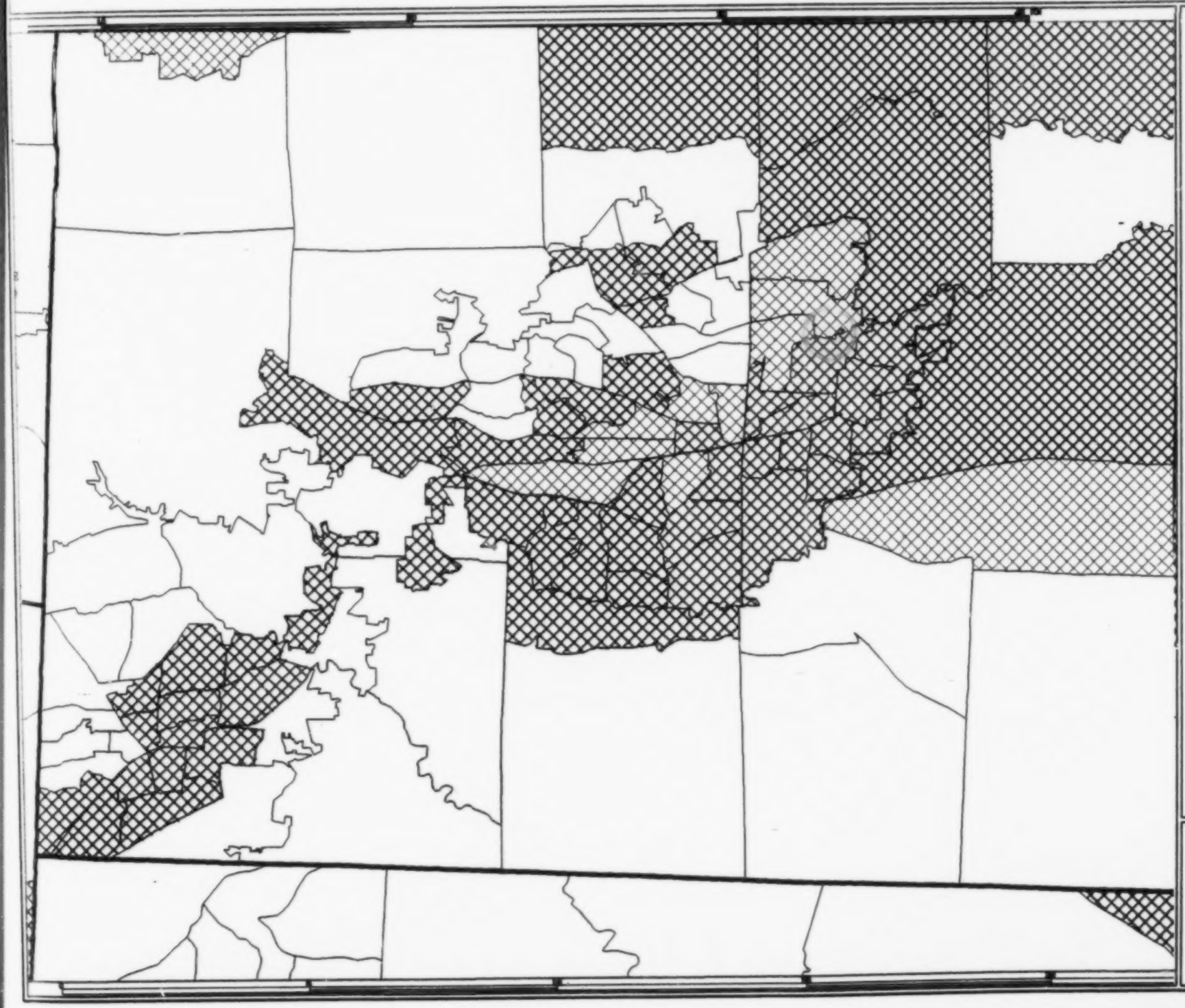
- County Boundary
- VTD Boundary
- Dist. Boundary (C004)
- 0 – 39.9% Democrat
- 40 – 49.9% Democrat
- 50 – 59.9% Democrat
- 60 – 100% Democrat

N.C. General Assembly
Legislative Services Off.
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Public Systems Associates

1997 Congressional Plan – Forsyth County
Voter Precincts by Percent Democratic Vote in 1988 COA Race



1997 Congressional Plan – Guilford County
Voter Precincts by Percent Democratic Vote in 1988 COA Race

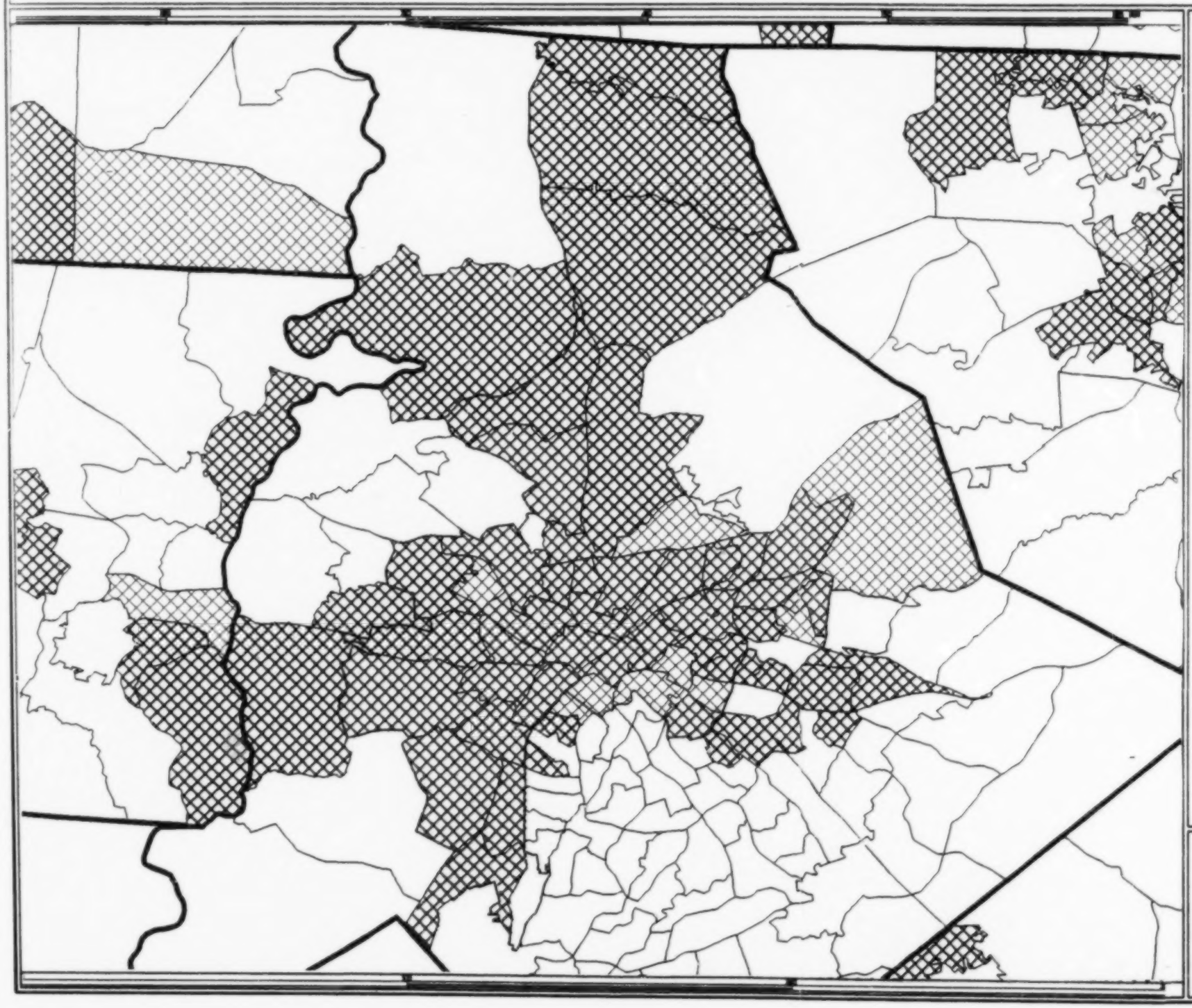


LEGEND

- County Boundary
- VTD Boundary
- *Dist. Boundary (C004)*
- 0 – 39.9% Democrat
- 40 – 49.9% Democrat
- 50 – 59.9% Democrat
- 60 – 100% Democrat

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

1997 Congressional Plan – Mecklenburg County
Voter Precincts by Percent Democratic Vote in 1988 COA Race



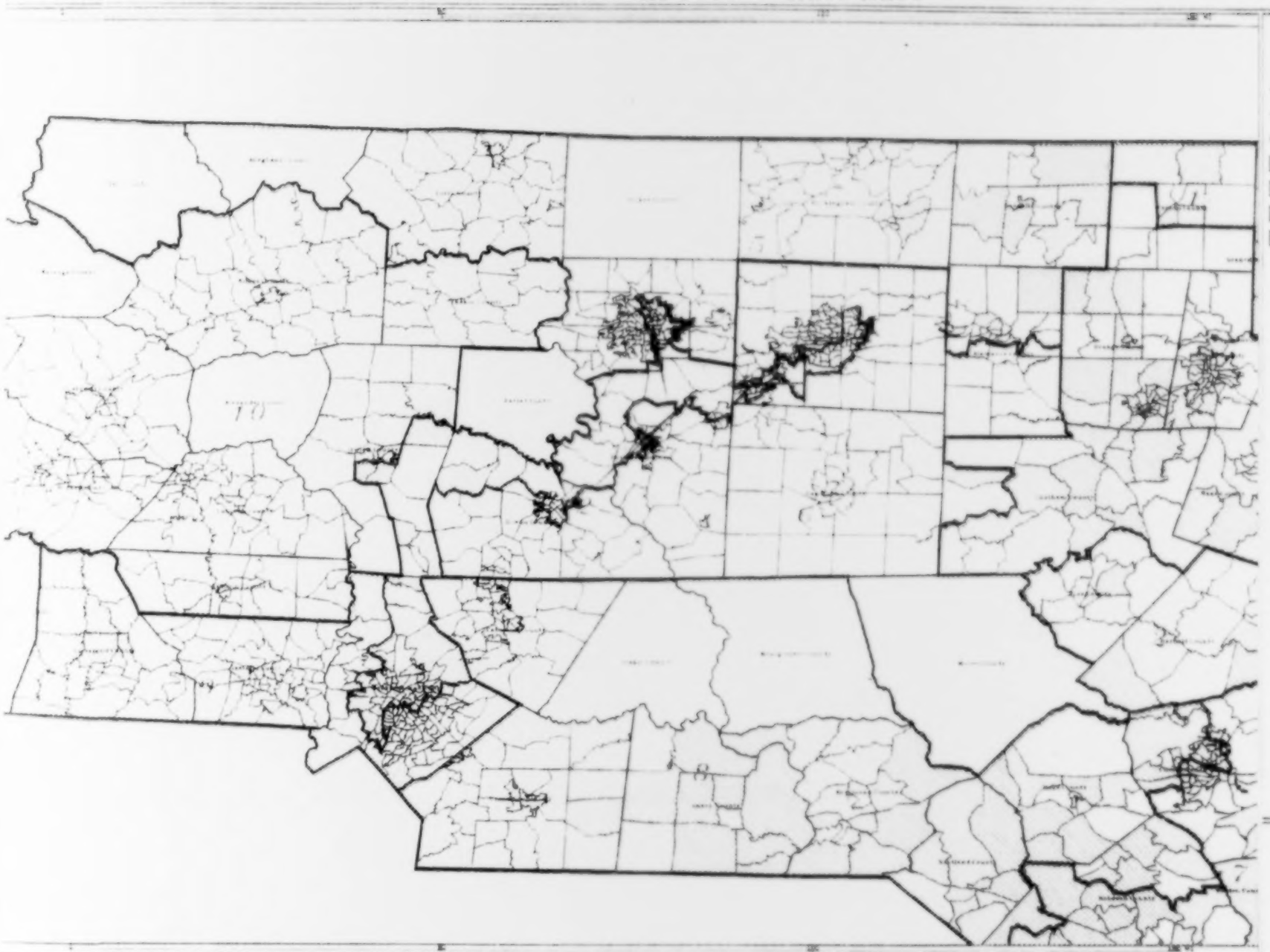
LEGEND

- County Boundary
- VTD Boundary
- *Dist. Boundary (C004)*
- 0 – 39.9% Democrat
- 40 – 49.9% Democrat
- 50 – 59.9% Democrat
- 60 – 100% Democrat

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Legislative Services Ofc.
Redistricting System
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1997 Congressional Plan – District 12
Region Precincts by Percent Democrat Vote
in 1990 Senate Race

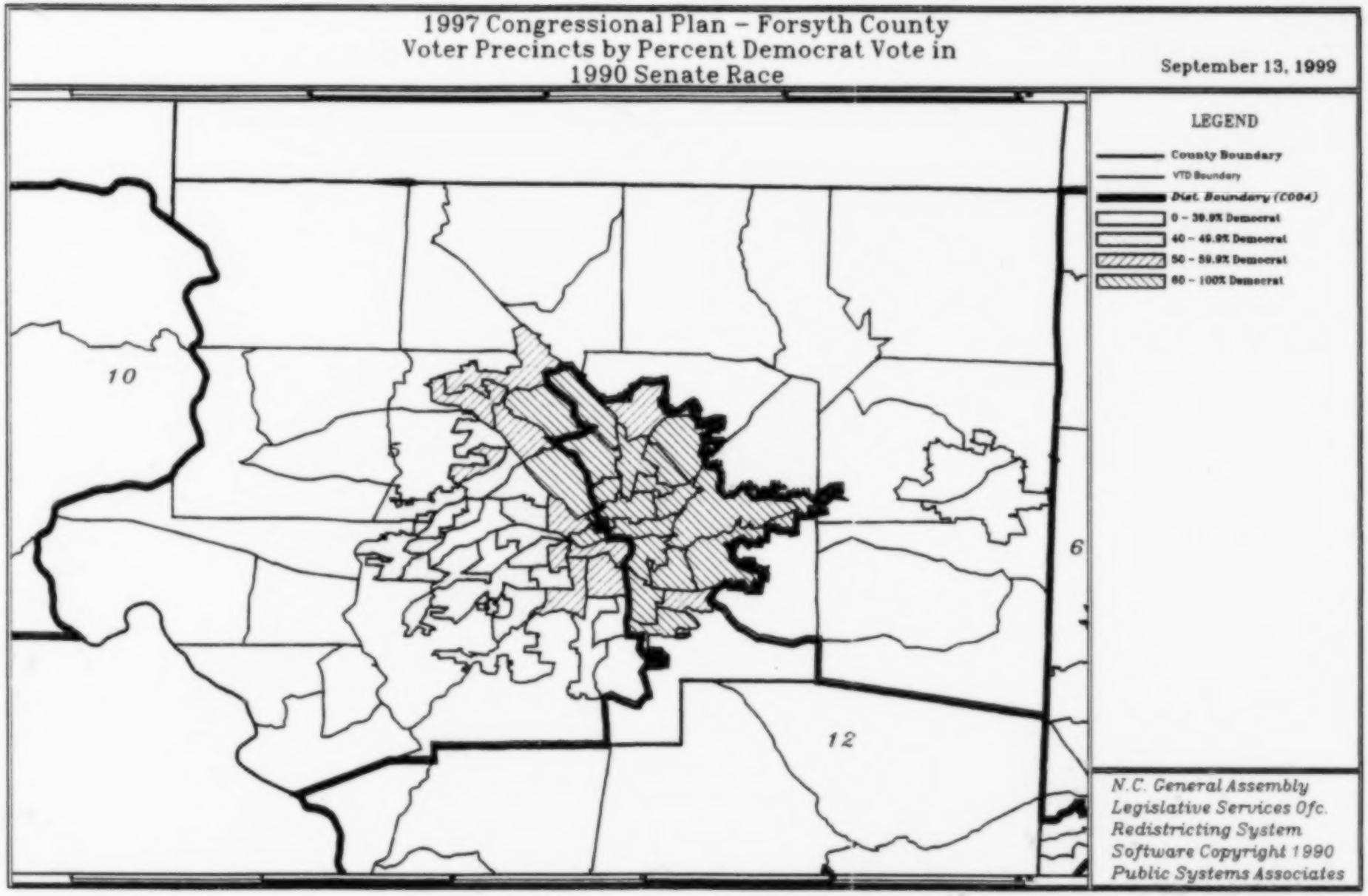
September 21, 1999



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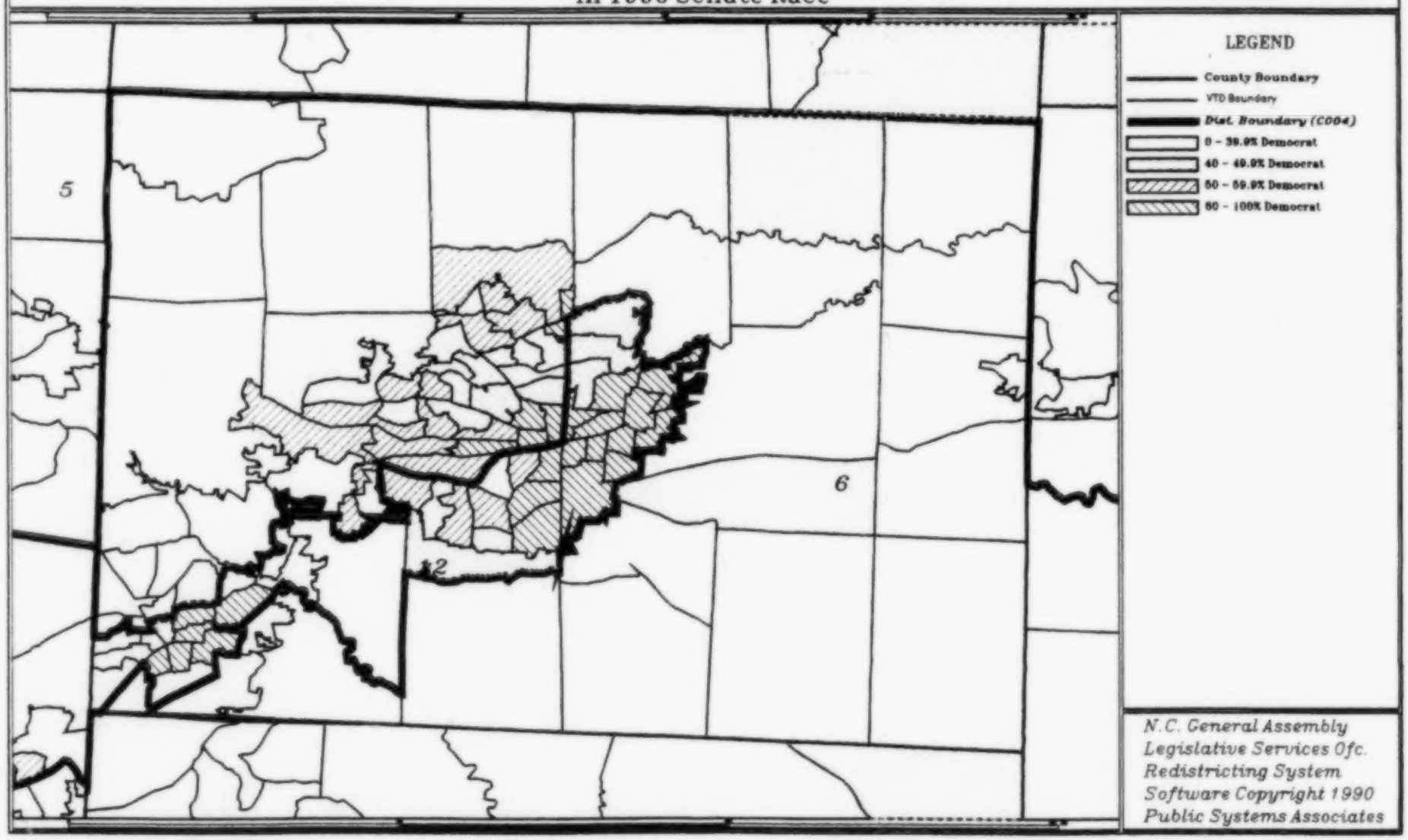
- County Boundary
- VTD Boundary
- Dist. Boundary (2004)
- 0 - 59.9% Democrat
- 40 - 49.9% Democrat
- 50 - 59.9% Democrat
- 60 - 100% Democrat
- 19 County

N.C. General Assembly
Legislative Services Off.
Redistricting System
Software Copyright 1990
Public Systems Associates


1997 Congressional Plan – Forsyth County
Voter Precincts by Percent Democrat Vote in
1990 Senate Race
September 13, 1999
LEGEND
County Boundary
VTD Boundary
Dist. Boundary (C004)
0 – 39.9% Democrat
40 – 49.9% Democrat
50 – 59.9% Democrat
60 – 100% Democrat
10
5
6
12
N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
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- 1997 Congressional Plan – Guilford County
Precincts by Percent Democrat Vote
in 1990 Senate Race

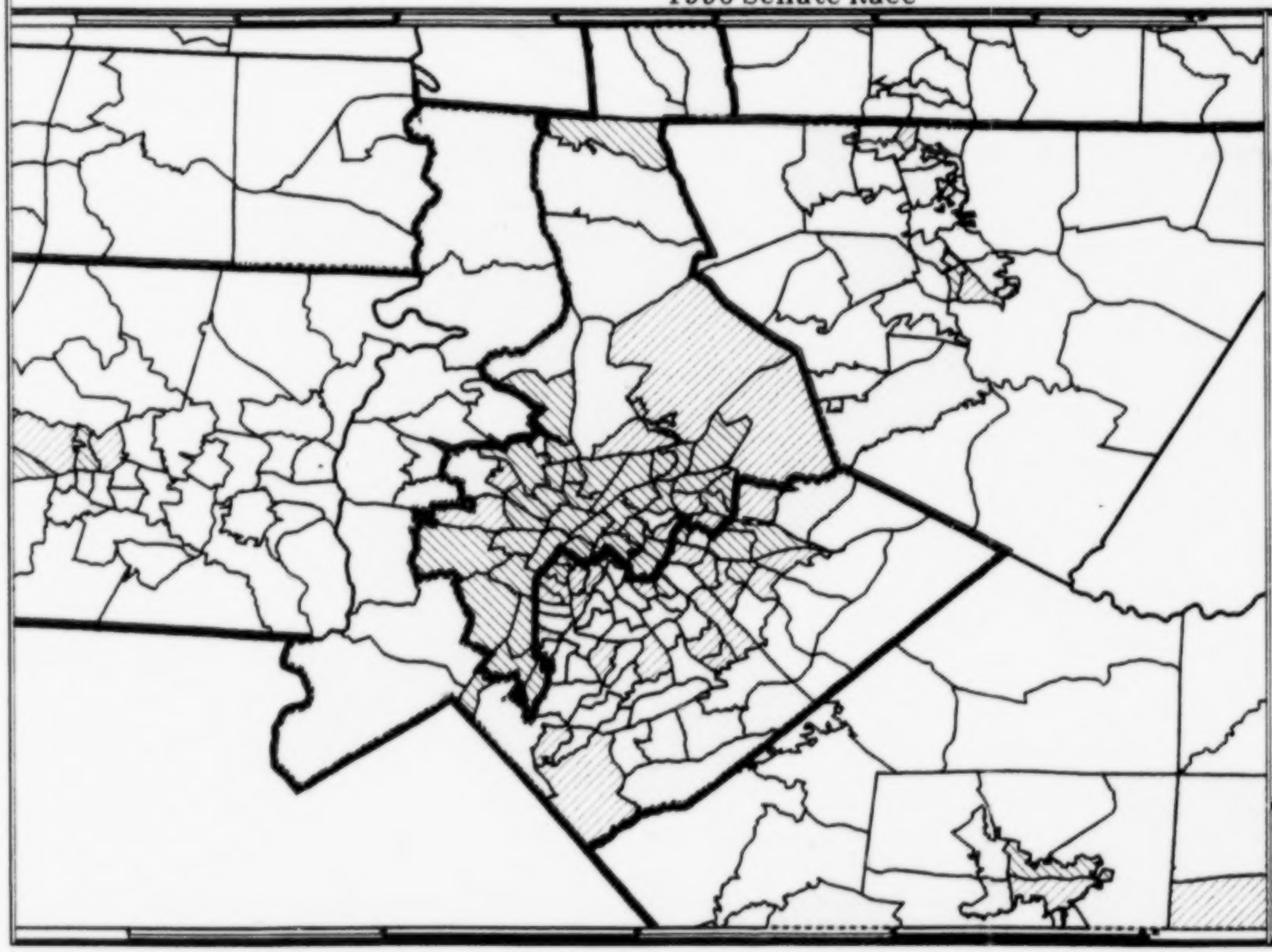
September 7, 1999



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Legislative Services Ofc.
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1997 Congressional Plan – Mecklenburg County
Precincts by Percent Democrat Vote in
1990 Senate Race

September 13, 1999



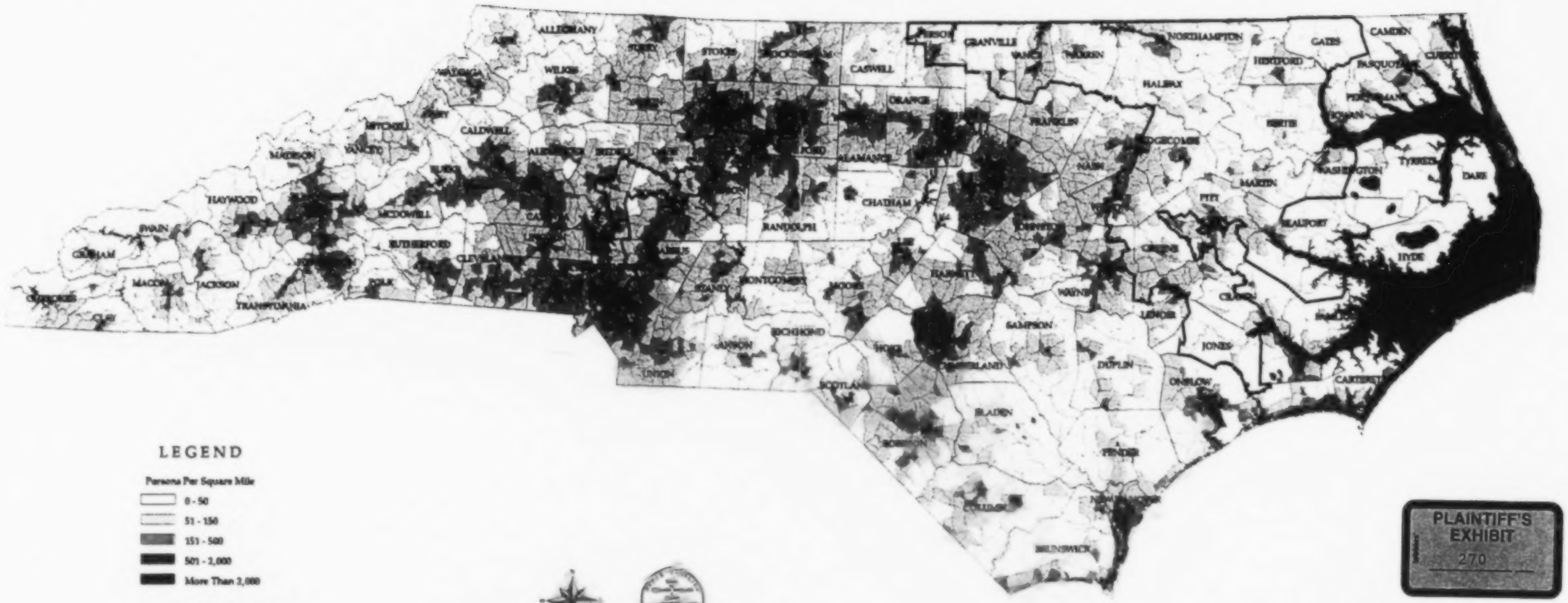
LEGEND

- County Boundary
- VTD Boundary
- *Dist. Boundary (C004)*
- 0 - 39.9% Democrat
- 40 - 49.9% Democrat
- 50 - 59.9% Democrat
- 60 - 100% Democrat

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
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North Carolina 1990 Population Density

(By Block Group)



LEGEND

Persons Per Square Mile

- 0 - 50
- 51 - 150
- 151 - 500
- 501 - 2,000
- More Than 2,000

- Major Hydrography
- 1997 Congressional District Boundary (Districts 1 & 12)
- State/County Boundary
- Block Group Boundary

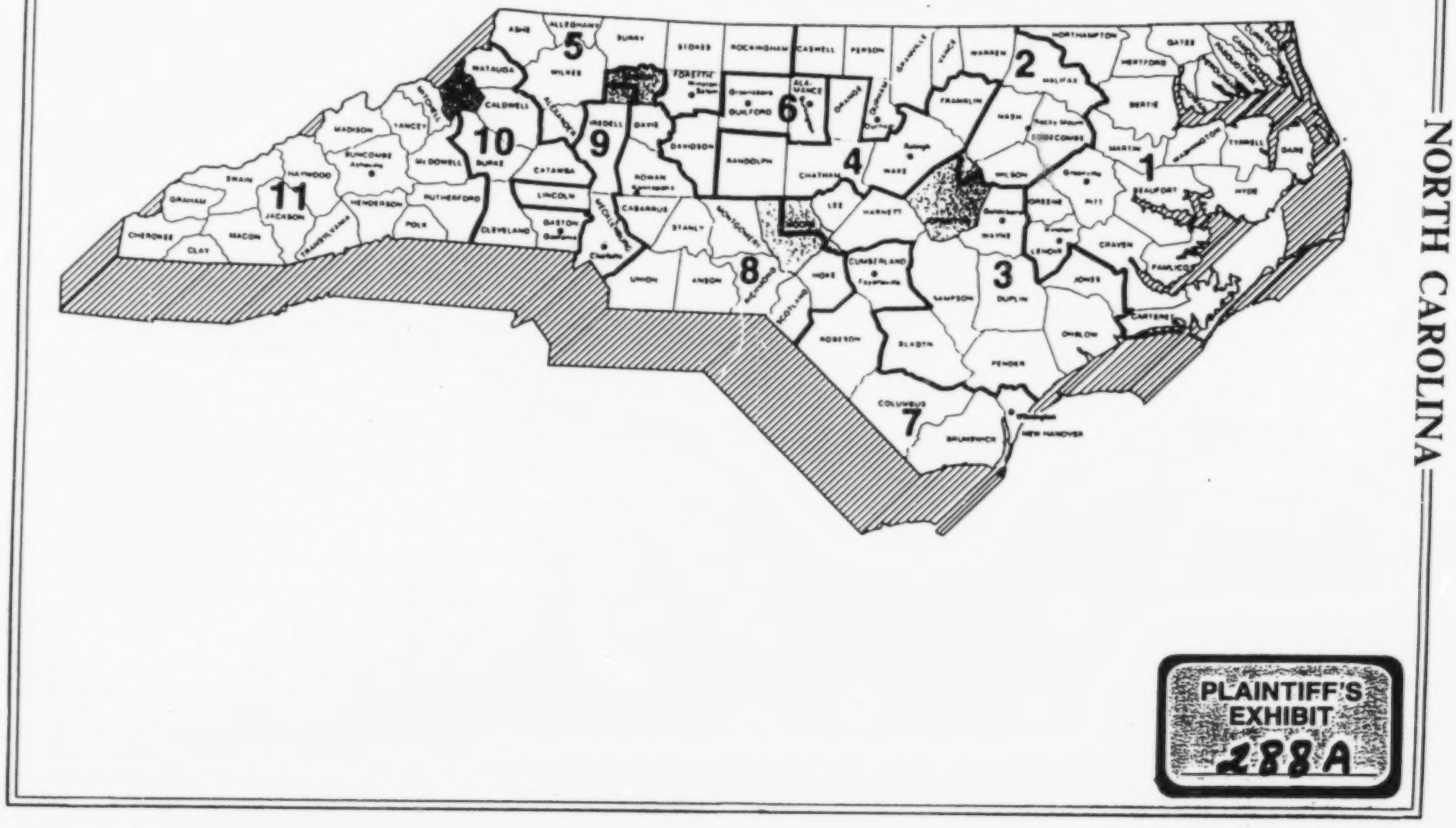


PLAINTIFF'S EXHIBIT
270

Congressional Districts (1 & 12)



Map Prepared November 1999 by the
N.C. Center for Geographic Information & Analysis
201 N. Wilmington St., Suite 700 * Raleigh, NC 27601-2825
Phone: (919)733-2090


NORTH CAROLINA
1
2
3
4
5
6
7
8
9
10
11
PLAINTIFF'S EXHIBIT
288A

Map of Congressional Districts, Counties, and Selected Cities

(11 Districts)

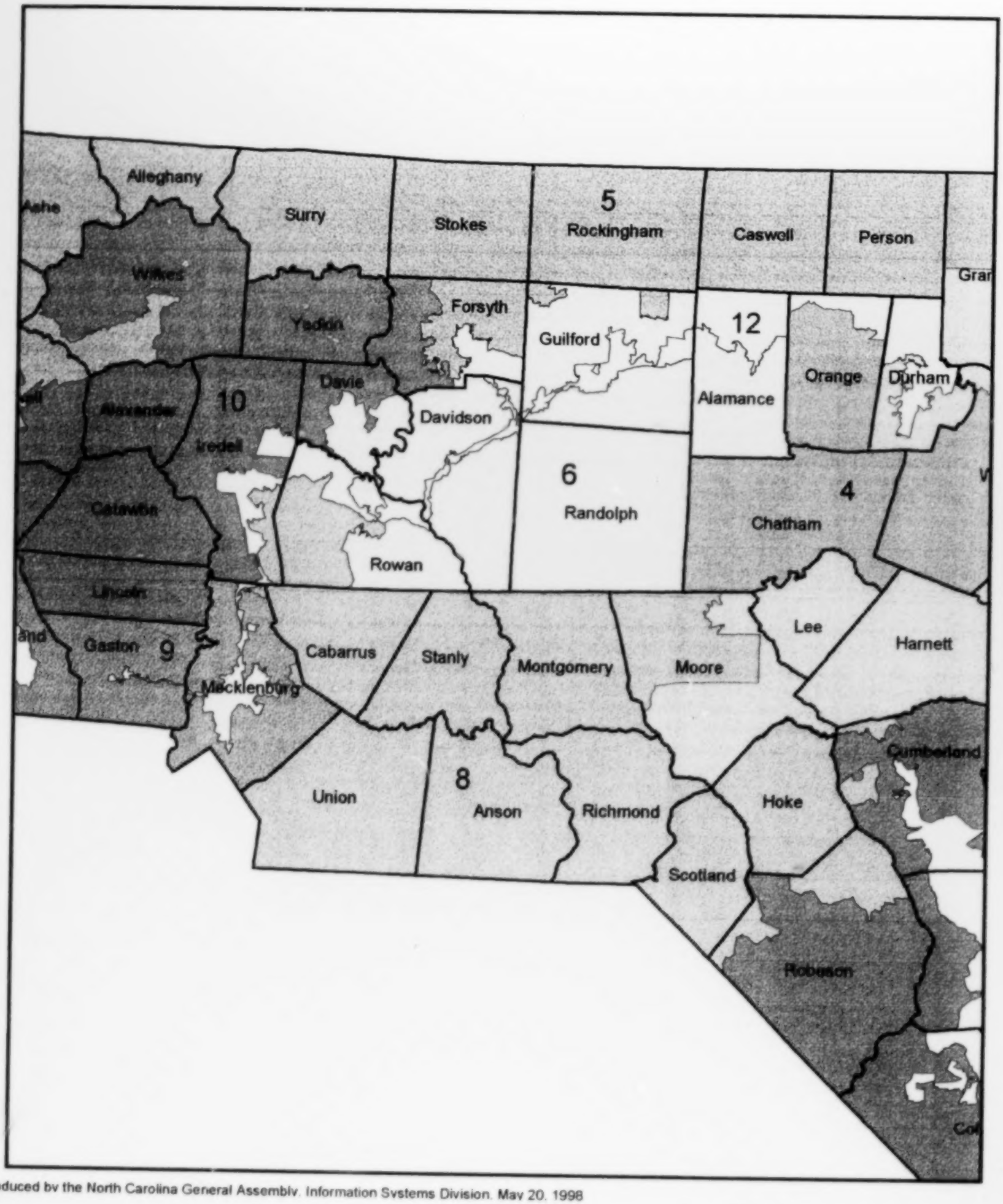


U.S. DEPARTMENT OF COMMERCE
SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION
BUREAU OF THE CENSUS

PLAINTIFF'S EXHIBIT
289

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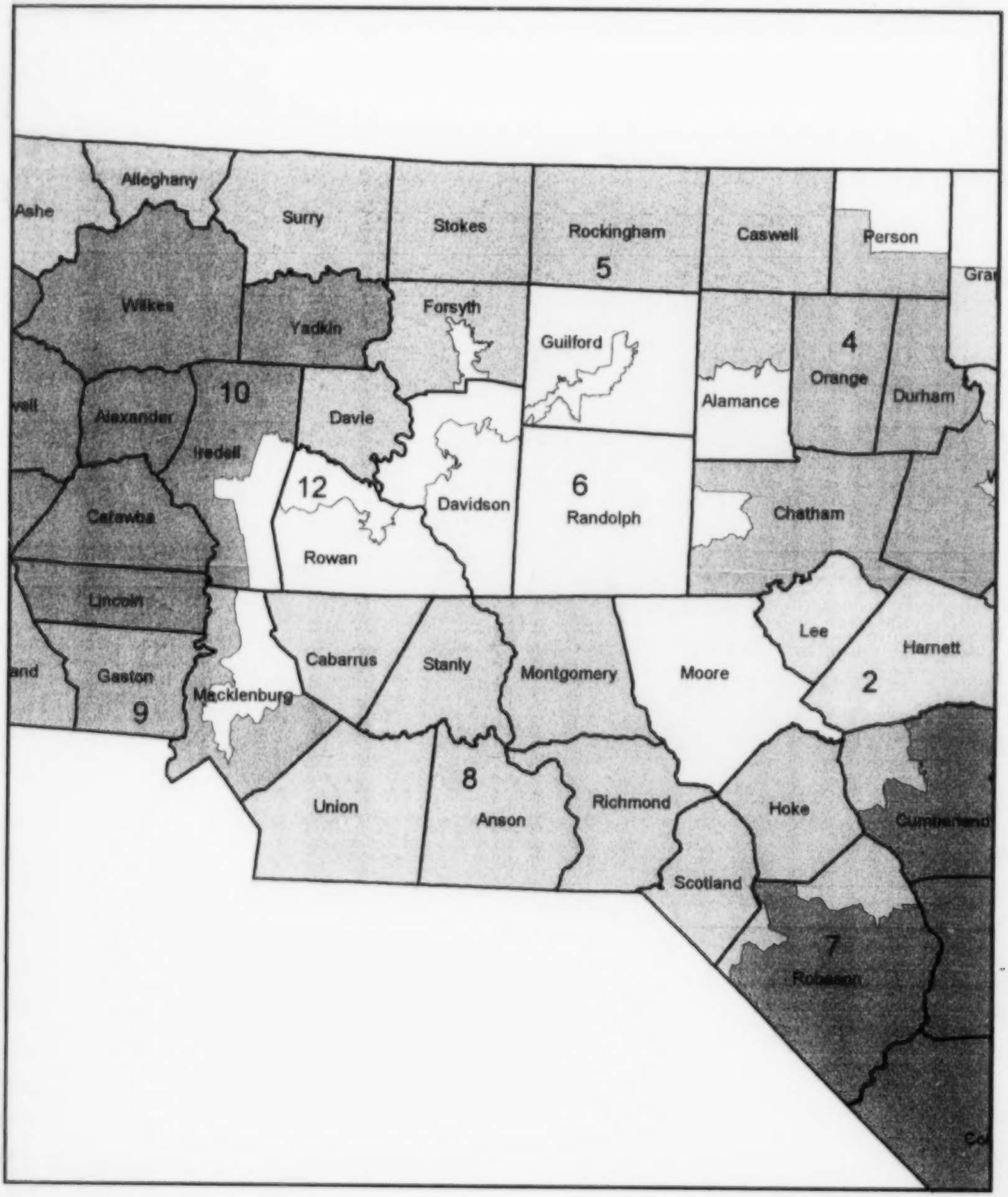
1992 Congressional Plan



Produced by the North Carolina General Assembly, Information Systems Division, May 20, 1998

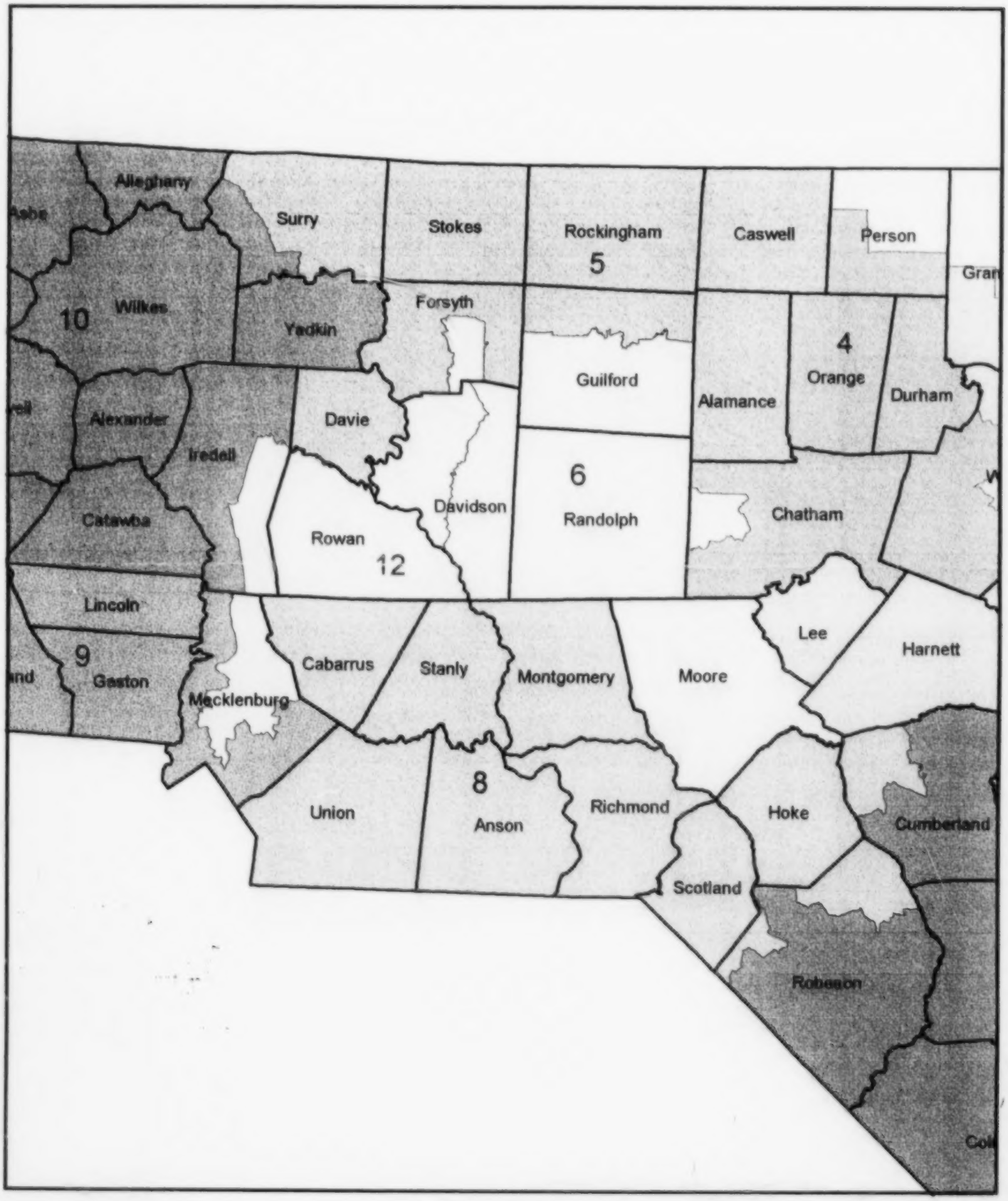
500

97 House/Senate Plan A



501

98 Congressional Plan A



502

EXHIBIT 306 - A CHRONOLOGY OF NORTH CAROLINA REDISTRICTING IN THE 1990S. AUGUST 1999 (EXCERPTS).

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

June 14, 1996	House Speaker Harold Brubaker (WR) appoints House Select Committee on Congressional Redistricting, headed by Rep. Robert Grady (WR).
July 3, 1996	Robinson O. Everett files *Cromartie v. Hunt* in U.S. Eastern District of N.C., using a *Shaw* theory to challenge the 1st congressional district. Action in the case is later stayed pending outcome of *Shaw*.
July 8, 1996	Senate President Pro Tem Marc Basnight (WD) appoints Senate Select Committee on Redistricting, headed by Sen. Roy Cooper (WD). Sen. Cooper writes letter to N.C. Attorney General Michael Easley saying that it is not feasible to redraw congressional districts in time for new districts to be used in 1996 congressional elections.
July 10, 1996	Senate Select Committee meets to discuss *Shaw* decision and the feasibility of enacting a remedial plan before the 1996 congressional elections.
July 12, 1996	3-judge panel allows *Shaw* plaintiffs and plaintiff-intervenors amend complaint to add new parties and challenge District 1.
July 17, 1996	House Rules Committee Chair Richard Morgan (WR) releases a congressional redistricting plan, "Congress-96-001", containing one majority black district in northeast and one majority black+Indian district in south.
July 19, 1996	3-judge panel issues order asking for opinions of Speaker, President Pro Tem, and committee leaders on whether it is feasible to adopt a remedial congressional plan for the 1996 elections. Senate says no. House says yes.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

July 24, 1996	House Rules Committee conducts a public hearing at which Rep. Morgan presents and explains "Congress-96-001".
July 30, 1996	3-judge panel issues order : • Prohibiting State from conducting any congressional elections after 1996 under existing plan. • Allowing State to conduct 1996 elections under existing plan. • Giving the General Assembly until April 1, 1997 to propose remedial plan.
September 29, 1996	Americans for Defense of Constitutional Rights, a group connected with the *Shaw* plaintiffs, announces it will award $1,000 to anyone who can draw a majority black congressional district that is ruled to be compact by expert judges. (It is later announced that $2,000 will be awarded to anyone who can draw two majority-black districts that pass the compactness test.)
November 5, 1996	Second general election held under 1990s redistricting plans. Following results occur in minority districts: CD1 -- Eva Clayton (BD) CD12 – Melvin Watt (BD) In addition, these black legislators are elected in multi-member, majority-white districts: Mickey Michaux (BD) in HD23, Jeanne Lucas (BD) in SD13, and Howard Lee (BD) in SD16. Total of 25 minority legislators is same as the 25 elected in 1994. Total of 2 minority Congress members is the same as 1994. Republicans and Democrats divide the U.S. House delegation evenly, 6 and 6. Shift of 2 seats from Republican to Democratic.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

December 17, 1996	Study Committee on Election Laws Reform recommends that 1997 General Assembly propose a constitutional amendment to give redistricting decisions to an Independent Redistricting Commission. This would apply to congressional and legislative redistricting beginning in 2001. The Study Committee will report January 3, 1997, to the Legislative Research Commission. The LRC will vote to transmit the request to the 1997 General Assembly. The proponent of the Independent Redistricting Commission, Rep. John Weatherly (WR), will introduce the Study Committee's recommendation February 5 as House Bill 52.
January 23, 1997	Magistrate judge gives plaintiff in *Daly v. High* until February 14 to report why the suit has not been served on the defendant.
January 29, 1997	1997 General Assembly convenes. With House Republican majority of 61-59, Speaker Harold Brubaker re-elected. With Senate Democratic majority of 30-20, President Pro Tem Marc Basnight re-elected. Speaker Brubaker appoints new House Committee on Congressional Redistricting, chaired by Rep. Ed McMahan (WR). President Pro Tem Basnight reauthorizes the Senate Select Committee on Redistricting, still chaired by Sen. Cooper.
February 5, 1997	Rep. Weatherly introduces HB 52, calling for a constitutional amendment to give an Independent Redistricting Commission, rather than the General Assembly, the authority to redistrict State House, State Senate, and Congress. The amendment would go into effect for the 2001 redistricting. The bill, similar to one Rep. Weatherly had introduced in 1995, was recommended by the Legislative Research Commission's Study Committee on Election Law Reform.
February 10, 1997	Deadline for submission of plans in the contest for compact minority districts conducted by Americans for Defense of Constitutional Rights.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

	Congressional
February 12, 1997	House CR Committee holds first meeting, hears from Edwin Speas, Senior Deputy State AG, on the *Shaw* litigation.
February 13, 1997	Rep. Mickey Michaux (BD) removed from House Redistricting Committee by Speaker. Replaced by Rep. Toby Fitch (BD). Speaker Brubaker says change was made to correct an oversight: He had originally intended to appoint Rep. Fitch.
February 20, 1997	Senate Select Committee meets. Sen Cooper presents "1997 Congressional Plan A," containing 2 minority districts. He says no vote will be taken on the plan, but that a public hearing will be held the next week.
February 24, 1997	Six N.C. Democratic Congress Members meet in Legislative Building with Sen. Cooper. They express mixed feelings about the Senate proposal. Robinson Everett announces there are no winners for the prize of $2,000 for drawing two compact majority-black congressional districts. But he awards $1,000 to Jack W. Daly for drawing the most compact majority-black single congressional district. Daly's plan, "Everett's Bane 3", split three counties and stretched from Durham to Pasquotank counties. *Daly says he will use the money to further his lawsuit.* John Sanders, retired director of the Institute of Government, is judge of the contest.
February 25, 1997	Rep. Weatherly introduces House Joint Resolution 322, providing for an independent commission to draw a congressional redistricting plan to satisfy the court order in *Shaw*. House CR Committee meets. Rep. McMahan presents "1997 House Congressional Plan A.1", similar in many ways to the Senate proposal. Rep. McMahan says no vote will be taken, but the plan will receive input at a public hearing.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

	Congressional
February 26, 1997	Joint House-Senate public hearing held in Legislative Building. Everett calls House and Senate proposals "fruit of the poisonous tree." Sen. Betsy Cochrane says Senate Republicans will present a plan that will have a minority district from Charlotte to the Sandhills. Rep. Weatherly promotes his idea of an independent commission. Several speakers address local matters.
February 27-March 18, 1997	Sen. Cooper and Rep. McMahan negotiate over differences between their two plans. Chief issue is how Wake County would be divided between Districts 2 and 4.
March 17, 1997	Irving Joyner, representing N.C. Association of Black Lawyers, sends letter to Sen. Cooper criticizing both House and Senate proposals.
March 19, 1997	Sen. Cooper introduces SB 433, embodying "1997 Congressional Plan A". Senate Select Committee meets, and Sen. Cooper presents SB 433 for a vote. Sen. Cochrane presents "Congress Cochrane" as an amendment; that amendment is defeated. Committee gives a favorable report to SB 433 as introduced. House CR Committee meets. Rep. McMahan presents "97 House Congress Plan G" for a vote. Under House rules, a favorable vote by a committee constitutes authorization for the committee to introduce the bill.
March 24, 1997	Rep. Grady introduces HB 585. Rep. McMahan introduces HB 586, embodying "97 House Congress Plan G", on behalf of his committee. The Speaker refers that bill back to the House CR Committee. Rep. McMahan and Sen. Cooper negotiate the differences between their committees' two plans and agree to "97 HOUSE/SENATE PLAN".

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

	Congressional
March 25, 1997	House CR Committee meets. Rep. McMahan presents the compromise, "97 HOUSE/SENATE PLAN", as a committee substitute for HB 586. Two amendments are defeated: • One from Rep. Dan Blue to change Dist. 4 so that Wake County would be predominately in Dist. 4. ("1997 CONGRESSIONAL PLAN D1") • One from Rep. Ronnie Sutton to a majority Native American precincts of Robeson County in Dist. 7. The Committee Substitute for HB 586 is given a favorable report without committee amendment. Rep. Steve Wood (WR) introduces HB 599, ("Shaw Compliance Plan C").
March 26, 1997	HB 586 goes to House floor. Rep. McMahan presents an overview, saying that the plan is designed so that all incumbents, black and white, Democratic and Republican, have a fair chance at re-election. Four amendments are offered: • One from Rep. Sutton, similar to one he offered in committee. It passes. • Three amendments from Rep. Mickey Michaux, embodying "Fitch Michaux Plan A", "Fitch/Michaux Plan B", and "Fitch/Michaux Plan C". All have one majority-black district and three districts with minority populations between 30% and 40%. They are defeated. House passes the bill on second reading 87-30. Bill passes third reading and is sent to Senate.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

March 27, 1997	Senate Select Committee on Redistricting takes up House-passed HB 586. No amendments are offered. Committee gives bill a favorable report. HB 586 goes to Senate floor. Sen. Cooper gives an explanation, says that while the bill is not designed to protect incumbents that it gave all incumbents a fair chance at re-election. He said the authors took note of the 6-6 partisan split in the congressional delegation and felt that they should not use court-ordered redistricting to overturn that decision of the people. One amendment is offered by Sen. Cochrane, embodying "Congress Cochrane". It is defeated. Senate passes bill on second reading 32-14.
March 31, 1997	HB 586 ratified as Chapter 11 of the 1997 Session Laws.
April 1, 1997	AG Easley files the ratified plan with the 3-judge panel. He also moves requesting that the court delay ruling on the plan until the U.S. Justice Department has precleared or denied preclearance pursuant to Section 5 of the Voting Rights Act.
April 9, 1997	Chapter 11 of 1997 Session Laws submitted to U.S. Justice Department under Section 5 of Voting Rights Act. Rep. Michaux introduces HB 901 (with Reps. Fitch and Adams).
April 23, 1997	House Congressional Redistricting Committee meets to consider HB 52 (Independent Redistricting Commission). After discussion, Committee votes to send bill to a subcommittee.
May 6, 1997	3-judge panel denies fees to Maupin, Taylor, Ellis, and Adams, attorneys for plaintiff intervenors in *Shaw*.
May 16, 1997	Reps. Michaux and Fitch meet with U.S. Justice officials in Washington to advocate for their congressional plan (embodied in March 26 House floor amendment) as alternative to enacted plan. (Date is 16th or earlier same week.)

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

	Continued
May 28, 1997	3-judge panel denies motion to intervene in *Shaw* suit by several black voters and associations. They sought to assert dilution claims and offer alternative plans.
June 9, 1997	U.S. Justice Department preclears Chapter 11. 3-judge panel directs *Shaw* plaintiffs and plaintiff-intervenors to tell court by July 19 whether they will object to dismissal of the suit and if so on what basis.
June 19, 1997	*Shaw* plaintiffs and plaintiff-intervenors respond that they wish the lawsuit to be dismissed without prejudice against the filing of a new one. Robinson Everett, plaintiffs' attorney, urges the court to declare the new plan unconstitutional, but states that his plaintiffs no longer have standing to challenge the new 12th or 1st districts, because they do not live in them. U.S. Supreme Court upholds court-ordered districting plan in Georgia.
July 3, 1997	State argues to court that plaintiffs and plaintiff-intervenors do live in the districts, do have standing to continue the lawsuit, and are seeking dismissal simply so they can file a new lawsuit and shop for a more favorable 3-judge panel.
August 28, 1997	1997 General Assembly adjourns until May 11, 1998.
September 12, 1997	3-judge panel dismisses the *Shaw* suit. In opinion accompanying its order, the court says the dismissal is only on the issue of the remedial adequacy of the violation of Equal Protection that the plaintiffs succeeded in showing against the former Dist. 12.
October 10, 1997	Robinson Everett, attorney for *Shaw* plaintiffs, lodges an amended complaint in *Cromartie v. Hunt*. The complaint uses a *Shaw* theory to challenge the March 31 congressional redistricting plan as "fruit of the poisonous tree" planted in 1992. Plaintiffs reside in the new 1st and 12th districts.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

	Continued
January 15, 1998	*Cromartie v. Hunt* moved to jurisdiction of the same 3-judge panel as *Daly*: Ervin, Voorhees, and Boyle.
March 31, 1998	3-judge panel holds hearing in Morganton on *Cromartie* cross motions for summary judgment and plaintiffs' motion for preliminary injunction.
April 3, 1998	3 -judge panel grants summary judgment and preliminary injunction in Cromartie for 12th district only. Gives State until April 8 to report how long it will take to redraw the plan and to propose a special primary schedule that would allow the general election in the new congressional districts to occur on November 3.
April 8, 1998	State tells 3-judge panel in *Cromartie* it needs more time to answer its questions.
April 9, 1998	3-judge panel in *Cromartie* extends State's deadline for responding to order.
April 13, 1998	U.S. Supreme Court denies stay of 3-judge panel's order enjoining 1998 congressional elections and requiring redrawing of plan. Decision is 6-3, with Breyer, Ginsburg, and Stevens dissenting.
April 14, 1998	3-judge panel issues Memorandum Opinion in *Cromartie*. Says the new 12th district shows race as a predominant factor and is uncompact. Says those issues are clear enough to grant summary judgment for 12th, but not so clear in case of the new 1st. district. Judge Ervin dissents.
April 17, 1998	State submits proposed schedule to 3-judge panel, including May 29 deadline for General Assembly to enact corrective plan and September 15 special congressional primaries with no runoff. State also moves that court allow May 5 primaries to proceed in congressional districts unaffected by redrawing District 12.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

April 21, 1998	3-judge panel orders schedule for redrawing and for special congressional primaries: • May 22 deadline for legislature to redraw. • June 24 for Voting Rights Act preclearance of redrawn plan. If no preclearance by then, Court will assume sole responsibility. • July 1 deadline for Court if Court must draw the plan. • July 6-20 special congressional candidate filing period. • September 15 special congressional primaries.
April 21, 1998	3-judge panel rejects State's motion to allow May 5 primary in "unaffected" congressional districts.
May 11, 1998	Regular 1998 Short Session of 1997 General Assembly convenes.
May 13, 1998	House and Senate Committees hold joint public hearing on congressional redistricting: • Robinson Everett urges legislators to redraw by creating a whole new plan, not simply by "tweaking" the 12th and leaving the 1st alone. He says Mecklenburg should not be split, and no district should run from Charlotte to Forsyth or Guilford. • Reps. Wayne Goodwin, Larry Womble, and Linwood Mercer and Sen. Betsy Cochrane present plans of their own.
May 18, 1998	House and Senate leaders agree upon "98 CONGRESSIONAL PLAN A." It changes only Districts 5, 6, 9, 10, and 12 from the 1997 plan. District 12 is removed from Guilford County and fills all of Rowan County. It goes from 46.67% black to 35.58% black.
May 19, 1998	Agreed-upon plan introduced by Sen. Cooper as SB 1185. Agreed-upon plan approved by House Congressional Redistricting Committee, which under House Rules can introduce it as a bill.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

May 20, 1998	House Congressional Redistricting Committee introduces its approved plan as HB 1394. Full House takes up HB 1394. Adopts an amendment providing that plan will be effective for 1998 and 2000 elections unless U.S. Supreme Court reverses the decision invalidating the prior plan. House then passes bill 90-27 on 2nd reading. House rejects effort by Rep. Linwood Mercer to delay final vote, saying he wanted time to prepare an amendment revising the 1st district. Bill passes 3rd reading. Senate Select Redistricting Committee approves SB 1185, after adopting the same amendment adopted on House floor.
May 21, 1998	Full Senate takes up HB 1394 instead of its own identical SB 1185, passes it on 2nd and 3rd readings 30-17. HB 1394 ratified as Session Law 1998-2.
May 22, 1998	Session Law 1998-2 submitted to both 3-judge panel and to U.S. Department of Justice under the Voting Rights Act.
May 27, 1998	Everett files objection to Session Law 1998-2
June 8, 1998	U. S. Department of Justice preclears Session Law 1998-2.
June 22, 1998	3-judge panel gives its approval to Session Law 1998-2 for 1998 election.
July 20, 1998	Special congressional candidate-filing period ends. Six candidates file for Republican nomination for 12th District.
July 22, 1998	State moves to consolidate *Cromartie* and *Daly* cases.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

	Congressional Plan
September	Special Congressional Primaries held, using 1998 Congressional Plan. Rep. Eva Clayton (B) wins Democratic nomination by 63.9% in District 1 over well-known white opponent, Linwood Mercer. Rep. Mel Watt (B) wins Democratic nomination in District 12 by 84.3% over less-well-known opponent. Republicans in 12th nominate Scott Keadle with 28% of the vote. Second primary was eliminated in special election schedule.
November 3, 1998	Incumbent black Democrats easily defeat Republican opponents in Districts 1 and 12, even though majority percentage significantly reduced. Eva Clayton (1st) – 62.2%. Mel Watt (12th) -- 55.9%.
January 20, 1999	U.S. Supreme Court hears oral arguments in *Hunt v. Cromartie*.
May 17, 1999	U.S. Supreme Court reverses 3-judge panel in Cromartie. Vote is 9-0. Justice Clarence Thomas writes for majority that summary judgment is inappropriate in a redistricting case where circumstantial evidence could give rise to conclusion that predominate reason for drawing district was political gerrymandering rather than racial gerrymandering. Because of language in the bill that enacted the 1998 plan, the Supreme Court's reversal reinstates the 1997 plan for the 2000 elections.

EXHIBIT 309

PROPORTION OF PRECINCTS IN SIX COUNTIES* THAT ARE IN CONGRESSIONAL DISTRICT 12, 1997 PLAN

	Precincts in CD 12	Precincts not in CD 12	% CD 12
All Precincts	154	275	35.90
More than 40% Black Population	76	3	96.20
More than 40% Democratic, as Measured by			
1990 U.S. Senate Election	124	146	45.93
1988 Court of Appeals Election	129	99	56.58
1988 Lieutenant Governor Election	137	145	48.58
Voter Registration	150	234	39.06

* Figures calculated from Defendants' Exhibit # 435

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Icon Box

Districts

Plan Builder v5.0

Function

1997 CONGRESSIONAL PLAN A DEMO

State (37)

STATE

Please choose function

Map Long. [W -] 85.2531 - 74.7469, Lat. [S -N] 32.0388 - 38.4612 (592.0090 x 443.1448 mi.)



Current District

District 3

Ideal population: 552,386
Variance: 382 (0.07%)
Total Pop.: [illegible]
White Pop.: 41
Black Pop.: 12
Am. Indian Pop.:
Asian Pop.:
Other Population:
Hispanic Pop.: 1
Total Voting Age Pop.: 41
White Voting Age Pop.: 32
Black Voting Age Pop: 8
Am. Indian Voting Age Pop.:
Asian Voting Age Pop.:
Other Voting Age Pop.:
Hispanic Voting Age Pop.:

Legend

FEATURE

Road
Railroad
Special Transport
Landmark
Physical Boundary
Political Boundary
Water
Unclassified
Boundaries Only

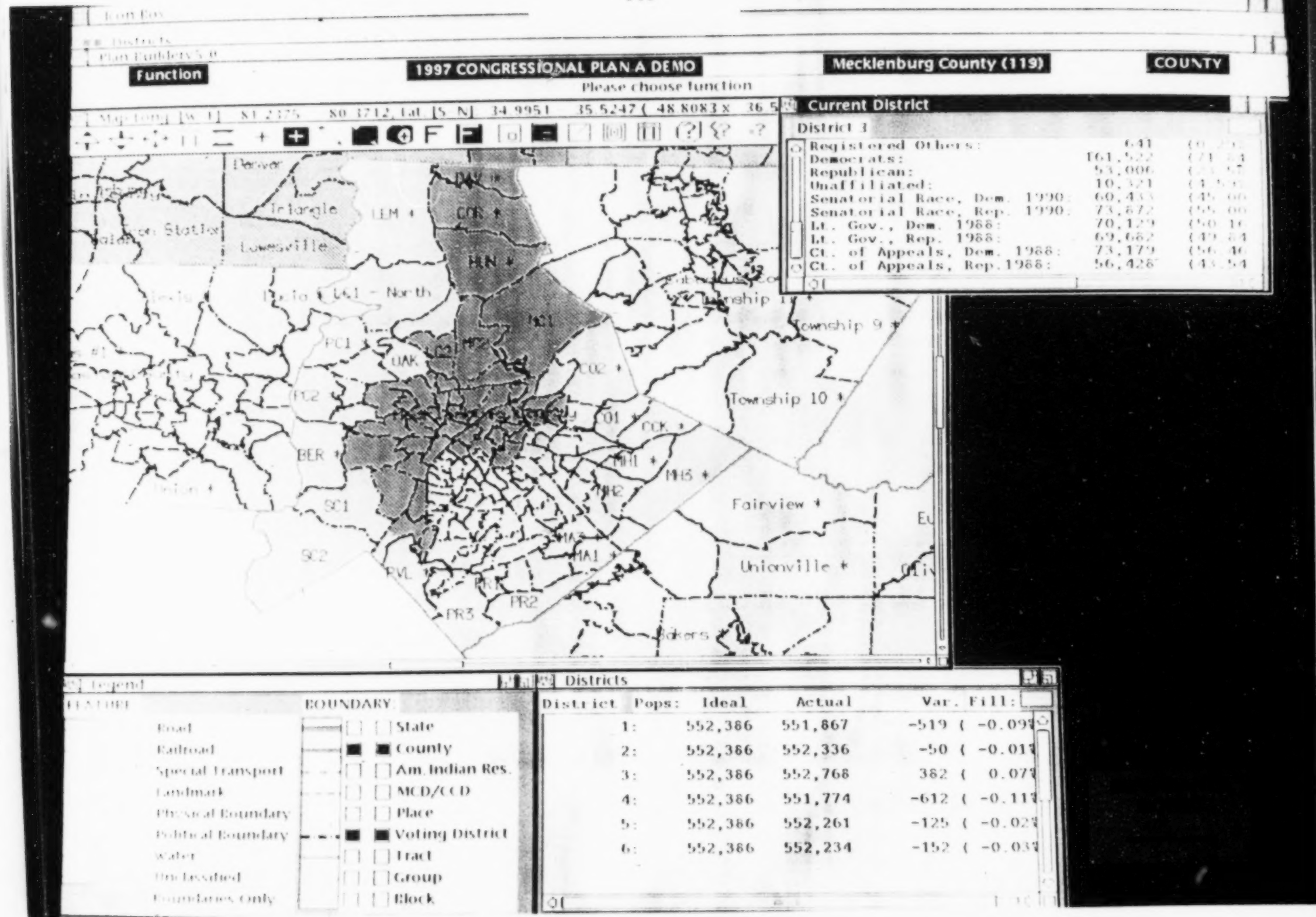
BOUNDARY:

State
County
Am. Indian Res.
MCD/CCD
Place
Voting District
Tract
Group
Block

Districts

District	Pops:	Ideal	Actual	Var.	Fill:
1:		552,386	551,867	-519	(-0.09%
2:		552,386	552,336	-50	(-0.01%
3:		552,386	552,768	382	(0.07%
4:		552,386	551,774	-612	(-0.11%
5:		552,386	552,261	-125	(-0.02%
6:		552,386	552,234	-152	(-0.03%

BEST AVAILABLE COPY


Function
1997 CONGRESSIONAL PLAN A DEMO
Please choose function
Mecklenburg County (119)
COUNTY
Current District
District 3
Registered Others: 641
Democrats: 161,522
Republican: 53,006
Unaffiliated: 10,321
Senatorial Race, Dem. 1990: 60,433
Senatorial Race, Rep. 1990: 73,672
Lt. Gov., Dem. 1988: 70,129
Lt. Gov., Rep. 1988: 69,662
Ct. of Appeals, Dem. 1988: 73,179
Ct. of Appeals, Rep. 1988: 56,428
Denver
Iredell
Statesville
Lowesville
Township 9
Township 10
Fairview
Unionville
Union
Legend
FEATURE
BOUNDARY
Road
Railroad
Special Transport
Landmark
Physical Boundary
Political Boundary
Water
Unclassified
Boundaries Only
State
County
Am. Indian Res.
MCD/CCD
Place
Voting District
Tract
Group
Block
Districts
District
Pops:
Ideal
Actual
Var.
Pct:
1: 552,386 551,867 -519 (-0.09
2: 552,386 552,336 -50 (-0.01
3: 552,386 552,768 382 (0.07
4: 552,386 551,774 -612 (-0.11
5: 552,386 552,261 -125 (-0.02
6: 552,386 552,234 -152 (-0.03

Function

1997 CONGRESSIONAL PLAN A DEMO

Please choose function

Mecklenburg County (119)

COUNTY

80.9429 80.7398 Lat [S N] 35.1223 35.2465 (11.4539 x 8.5668 mi)

	641	(0.1%
	161,522	(29.1%
	55,000	(9.9%
	10,321	(1.9%
Dem. 1990:	60,155	(35.9%
Rep. 1990:	73,572	(55.0%
1988:	70,129	(50.1%
1988:	69,682	(49.9%
Dem. 1988:	73,179	(56.4%
Rep. 1988:	56,428	(43.5%

BOUNDARY

- State
- County
- Am Indian Res
- MCD/CCD
- Place
- Voting District
- Tract
- Group
- Block

Districts

District	Pops:	Ideal	Actual	Var.	Fill:
1:		552,386	551,867	-519	(-0.09%
2:		552,386	552,336	-50	(-0.01%
3:		552,386	552,768	382	(0.07%
4:		552,386	551,774	-612	(-0.11%
5:		552,386	552,261	-125	(-0.02%
6:		552,386	552,234	-152	(-0.03%

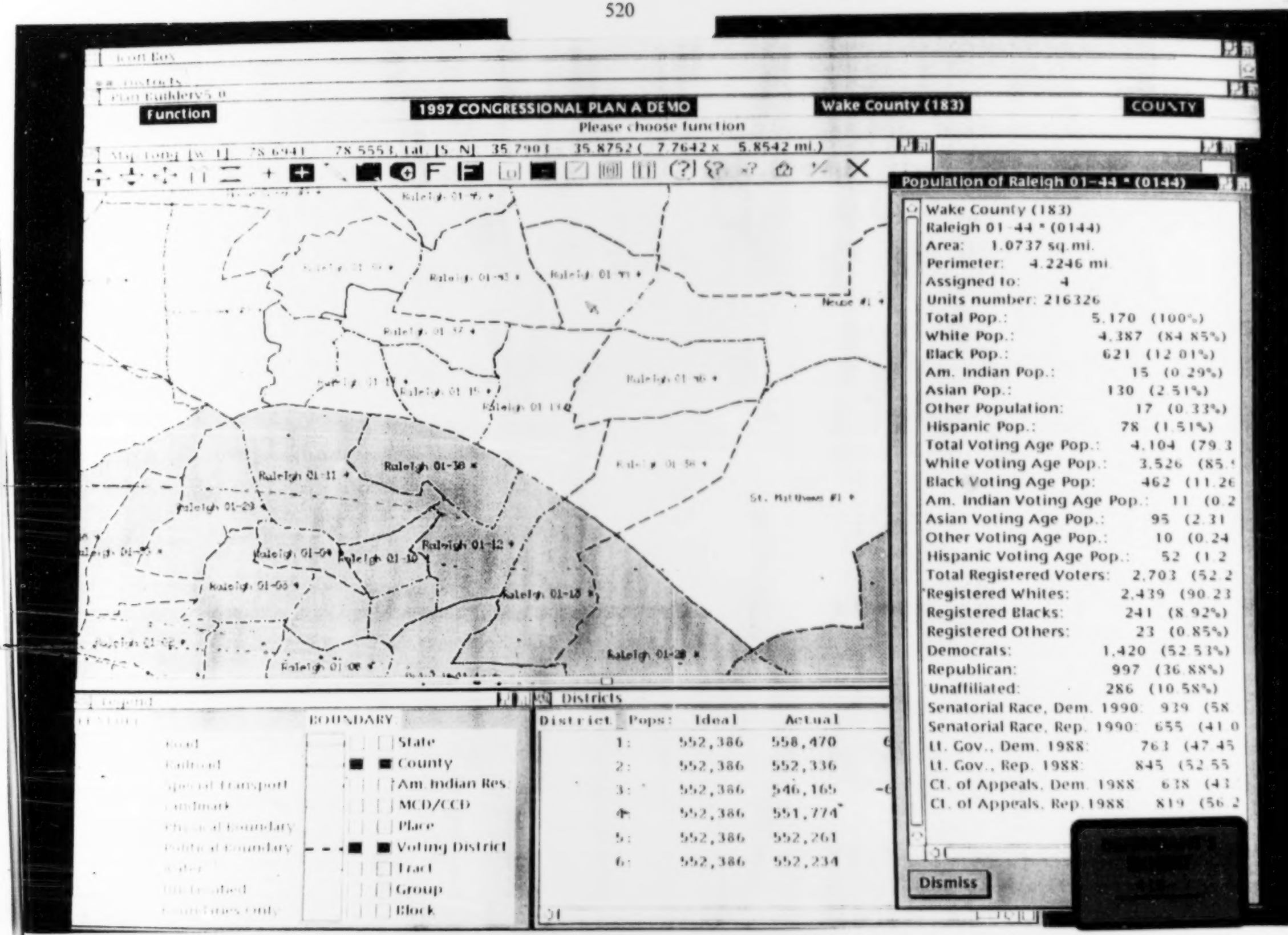

Function
1997 CONGRESSIONAL PLAN A DEMO
Wake County (183)
COUNTY
Please choose function
Raleigh 01-38 *
Raleigh 01-12 *
Raleigh 01-13 *
Raleigh 01-28 *
St. Matthews #1 *
Population of Raleigh 01-44 * (0144)
Wake County (183)
Raleigh 01-44 * (0144)
Area: 1.0737 sq.mi.
Perimeter: 4.2246 mi
Assigned to: 4
Units number: 216326
Total Pop.: 5,170 (100%)
White Pop.: 4,387 (84.85%)
Black Pop.: 621 (12.01%)
Am. Indian Pop.: 15 (0.29%)
Asian Pop.: 130 (2.51%)
Other Population: 17 (0.33%)
Hispanic Pop.: 78 (1.51%)
Total Voting Age Pop.: 4,104 (79.3
White Voting Age Pop.: 3,526 (85.9
Black Voting Age Pop: 462 (11.26
Am. Indian Voting Age Pop.: 11 (0.2
Asian Voting Age Pop.: 95 (2.31
Other Voting Age Pop.: 10 (0.24
Hispanic Voting Age Pop.: 52 (1.2
Total Registered Voters: 2,703 (52.2
Registered Whites: 2,439 (90.23
Registered Blacks: 241 (8.92%)
Registered Others: 23 (0.85%)
Democrats: 1,420 (52.53%)
Republican: 997 (36.88%)
Unaffiliated: 286 (10.58%)
Senatorial Race, Dem. 1990: 939 (58
Senatorial Race, Rep. 1990: 655 (41.0
Lt. Gov., Dem. 1988: 763 (47.45
Lt. Gov., Rep. 1988: 845 (52.55
Ct. of Appeals, Dem. 1988 638 (43
Ct. of Appeals, Rep. 1988 819 (56.2
Dismiss
BOUNDARY
State
County
Am. Indian Res.
MCD/CCD
Place
Voting District
Tract
Group
Block
Districts
District Pops: Ideal Actual
1: 552,386 558,470
2: 552,386 552,336
3: 552,386 546,165
4: 552,386 551,774
5: 552,386 552,261
6: 552,386 552,234

EXHIBIT 421 (EXCERPTS)

AN EVALUATION OF NORTH CAROLINA'S 1998 [1997*] CONGRESSIONAL DISTRICTS

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I am a Professor of Geography at the University of Alabama, Tuscaloosa, Alabama, where I have been employed for the past nine years. My formal education includes a BA (1975) in political science from the University of Colorado-Denver, a MS (1980) in geography from Western Washington University, and a Ph.D. (1984) in geography from the University of Kentucky. My primary research and teaching emphases are in political geography, and range in topical focus from the local to international scales. My research has most emphasized topics in electoral geography including the issue of redistricting. I have authored over 50 publications including more than 30 in refereed journals on varied topics including redistricting. Between 1995 and 1997 I served as the Chair of the Political Geography Specialty Group, Association of American Geographers, the largest organization of political geographers in the world. My Vita accompanies this report.

* References to 1998 congressional districts are to districts used in the 1998 elections held under the 1997 Plan.

On December 9, 1997, I met with representatives of the North Carolina Attorney General's Office and was asked to evaluate the state's twelve congressional districts intended for use in the 1998 elections (hereafter referred to as the "1998 districts"). For this purpose I was provided maps of the 1992-1996 (hereafter referred to as the "1992 districts") and 1998 districts, and access to data from Election Data Services, one of the country's most prominent providers of data on elections and districts. From Election Data Services I secured the majority of the compactness indicators used in this report, and shape files of the congressional districts in selected states including North Carolina.

The purpose of this report is to evaluate the twelve congressional districts now in place for the 1998 elections (Figure 1). Where pertinent, these districts are compared to the 1992 districts (Figure 2). This report uses a set of traditional districting criteria on which to base its evaluation. Basic background reading on these criteria is found in the published work of Professor Richard Morrill (Department of Geography, University of Washington), and Professor Bernard Grofman (School of Social Sciences, University of California, Irvine).

Professor Morrill is a political geographer and the foremost geographic authority on districting procedures in the United States today. His 1981 monograph, *Political Redistricting and Geographic Theory*, includes a chapter entitled "Criteria for Redistricting" which is cited in this report. Professor Grofman is a political scientist and is among the most recognized authorities from that discipline on redistricting

issues. Professor Grofman's "Criteria for Districting: A Social Science Perspective" published in the UCLA Law Review in 1985 is perhaps the most exhaustive evaluation of redistricting criteria published in the past twenty-five years. (Additional sources detailing districting criteria include Dixon 1982; Morrill 1982, 1987 and 1994; Cain 1984; Butler and Cain 1992; Grofman et al., 1992; Grofman 1993; Pildes and Niemi 1993).

REDISTRICTING CRITERIA

What follows is an evaluation of North Carolina's twelve congressional districts on the basis of the following criteria: equal population, contiguity, compactness, the integrity of local government boundaries, and continuity of representation. It should be noted at the outset that it is virtually impossible for a redistricting plan to simultaneously satisfy all criteria perfectly or completely.

In some cases, the real-world application of two criteria may contradict one another. For example, published work on the districting process suggests that the number of county divisions should be limited where possible. But it is nearly always impossible to have no divided counties in the redistricting process due to the constitutionally-based requirement that districts have little or no difference in their populations. Thus, any county with a population above the ideal population will of necessity be divided among two or more districts. And it is frequently necessary or appropriate to divide counties with smaller populations between two or more

districts to achieve compliance with the equality of population criterion or another districting goal. In short, it is indeed rare for a state not to divide some, if not many, counties. At present all southern comparison states include multiple county divisions on their congressional district maps. Twenty-six (38.8%) of Florida's 67 counties, for example, are divided between multiple congressional districts (Duncan and Lawrence 1997: 298-299).

In other cases, data limitations and real-world constraints limit the degree to which one or more criteria may be simultaneously satisfied. For example, a state with an irregular coastline will find it nearly impossible to create highly compact districts in that area of the state. A state which uses county boundaries which follow the irregular courses of rivers will find it difficult if not impossible to create highly compact districts. The pattern of population distribution can also severely limit the degree of resulting compactness. Hence, a state with an uneven population density will likely find it difficult to create highly compact districts while achieving equality of population between districts. An evaluation of districting plans must therefore consider the existing map in light of state or local conditions, and not solely on the basis of theoretical possibilities.

Some explanation of each criterion's purpose precedes the North Carolina specific evaluation. All Tables and Figures referenced in this evaluation are found sequentially at the rear of the report following the references. An Appendix follows the referenced Tables and Figures which includes maps

depicting each of North Carolina's twelve 1992 and 1998 congressional districts.

1) Equality of Population.

The "equality of population" criterion stems from the U.S. Constitution and it therefore must carry substantial, if not preeminent, weight in the development of all redistricting plans. Since the 1960s the legally permissible variations between district populations have declined substantially. Concomitant improvements in technology and the detail of the data provided by the U.S. census have allowed ever-greater adherence to the principal of one-person-one-vote.

Population equality between districts may be measured by multiple indicators. The "total deviation" (also referred to as the overall range) is defined as the population difference between the smallest and largest districts (see Grofman 1985: 175, for the total deviations of districts existing in 1983, and Rayburn and Leib 1994: 23, for the total deviations existing in 1993). The "maximum deviation" is defined as the largest absolute (+ or -) population deviation among a jurisdiction's districts relative to the optimal population (total population/number of seats) to be allocated to each district. Also pertinent is the mean or average of all district deviations from the ideal population. These measures may be expressed in terms of absolute numbers and percents.

The maximum permissible population deviation of districting plans depends on their geographic scale - whether,

for example, the districts are used to elect members of the U.S. House of Representatives, a state legislature, or a city council. Due to the limits of both the census of population data and geography, maximum allowable deviations are generally greater the more local the jurisdiction being evaluated. But congressional districts are expected to have total deviations of less than 1% (Morrill 1981; Grofman 1985; Grofman et al., 1992). As determined by Rayburn and Leib (1994: 23), the districting plans in all states in 1993 were in compliance with this criterion with the largest total deviation determined for Georgia at 0.94%.

The ideal population for each congressional district in North Carolina is 552,386 (1990 state population of 6,628,637 / 12 districts = 552,386.42) (Table 1). The average absolute (+ or -) deviation of North Carolina's twelve congressional districts is 361 individuals, or 0.065% of the ideal population to be allocated to each district. Among the districts, District 7 has the smallest deviation at a mere 4 individuals (0.001%), and District 10 the largest at 947 individuals (0.171%). District 10's deviation thus constitutes the Maximum Deviation for the state's congressional districts. The Total Deviation for the twelve districts is 0.270%.

In terms of the population equality criterion, North Carolina's present congressional districts are well within accepted guidelines. Their level of population equality is therefore evaluated favorably on this criterion. But it should be noted that 1990 census of population data is now eight years old. Based upon population projections by the North Carolina

Office of State Planning, the state's 1997 population was nearly 12 percent greater than enumerated in 1990. That office further projects the next Census, to be undertaken in a little over two years, will enumerate 7.7 million North Carolinians, or 16.4 percent more individuals residing in the state than were counted in 1990. Thus, while the constitutional purpose of the census of population is to aid the reapportionment and redistricting process and the 1990 census should be used for such comparisons, malapportionment is clearly a result of using eight year old data. It is therefore true that any subsequent delineation of North Carolina's 12 congressional districts prior to the 2000 census will be hampered in achieving compliance with the preeminent criterion of the districting process, that of equal population between districts.

2) Contiguity.

There is no Constitutional obligation for congressional districts to be contiguous, though some states include such a requirement in their constitutions variously pertaining to legislative or congressional districts (Grofman 1985). The state of North Carolina does not formally stipulate that congressional districts be contiguous. A district is typically defined as contiguous if every part of the district is accessible to all other parts without traveling into a second district. This requirement has rarely generated controversy in the past. When controversy has emerged, the focus of contention has generally pertained to areas dissected by water features and whether bridge connections are sufficient to constitute contiguity (see Grofman 1985: 84).

All of North Carolina's 1998 districts are contiguous, and are thus evaluated favorably on this criterion. Second, on this criterion the present plan compares very favorably with the state's 1992 congressional districts which generated controversy pertaining to the contiguity of the 6th and 12th districts (Grofman 1993: 1261). The practical contiguity of Districts 1, 2, 5 and 10 was also substantially improved. For example, the proruption of District 2 into District 1 in Halifax County in the 1992 plan no longer exists. In the 1998 plan the mutual boundary of Districts 1 and 2 is the Halifax County-Nash County boundary. A second example pertains to the no longer existing proruption of District 5 into District 10. The boundary between these two districts now entirely follows county boundaries.

3) The Allocation of Local Government or Electoral Units.

The non-division of local political units in their allocation to districts has traditionally been viewed as a legitimate though secondary goal of the districting process. Counties, for example, may constitute political systems in and of themselves. But it is also true that the equal population criterion carries substantially greater weight in all evaluations of districting plans than efforts to limit county subdivisions. Thus, any county which has a population above the ideal population per district will almost certainly be divided into two or more districts in a system which employs single-member districts.

At times it may be either appropriate and/or necessary to subdivide counties with lesser numbers of residents to achieve compliance with the equal population or another districting goal. For example, it may well be appropriate to divide the urban environs of a county from its dominantly rural hinterland given the widely differing circumstances oftentimes found in these two settings. Such divisions can be beneficial to the quality of representation provided to the constituents in a district because Representatives do not have to simultaneously focus their attention on both urban (e.g., mass transit and crime) and rural needs (e.g., agriculture and basic highways). In short, it is nearly always technically impossible in any state with two or more districts for all counties to be allocated in their entirety to congressional districts and meet the goals of other criteria. And there are numerous practical reasons for dividing counties as well. Hence, county divisions are commonplace and all southeastern state comparators include multiple county divisions (Webster 1995; Duncan and Lawrence 1997).

The 1992 congressional districts in North Carolina divided 44 off the state's 100 counties (Webster 1995). The 1998 congressional districts reduce this number to 22, a 50% percent decline in the number of county divisions. This level of county divisions compares favorably with Florida, a state having undergone similar litigation, which divides 26 of its 67 counties, or nearly 40%. Thus, from the perspective of county divisions, the 1998 districts are superior to the 1992 districts on this criterion. Secondly, using Florida for the comparator,

North Carolina's proportion of divided counties is judged acceptable.

The building block units used to delineate congressional districts differ between states. While some states rely on census units such as blocks or tracts, others use voting districts or precincts (Raburn and Leib 1994: 23). For the 1990 census the Bureau of the Census requested that all states participate in an effort to geographically mesh voting districts with other units of census geography. Approximately three-quarters of the states fully participated, with the remainder participating in varying degrees. In North Carolina seventy-nine of the state's 100 counties fully participated and are subdivided by voting precincts which follow the boundaries of other units of census geography such as blocks or tracts (see Rayburn and Leib 1994).

It should be a goal of districting plans to avoid subdividing voting precincts wherever possible unless local circumstances make such divisions appropriate. If voting precincts are subdivided by congressional district boundaries, additional polling units or ballot forms may be required. Such changes can lead to voter confusion and frustration.

As of October 1, 1996, there were a total of 2,531 election precincts in the state of North Carolina. The 1992 districts divided 80 precincts. The 1998 districts reduce this number to only 2. Thus, the 1998 districts are vastly superior to the 1992 districts in their very minimal number of voter precinct divisions. Secondly, it has been conveyed by the

Attorney General's Office to the author that the basis for the 2 precinct divisions pertained to local circumstances. This being true, the 1998 congressional district map must be judged very favorably in terms of its use of precincts as district building blocks.

Of the 31 counties which do not include census voter precincts, only one (Beaufort County) is not allocated to a 1998 congressional district in its entirety. This division employed township boundaries which are vastly superior to the use of census blocks or tracts which may have little significance to human patterns of interaction or governance.

4) Geographic Compactness.

Unlike the equality of population criterion, the geographic compactness criterion has no foundation in the U.S. Constitution. But it has long been viewed as a legitimate criterion for evaluating redistricting plans, and is included as a goal in approximately half of all state constitutions. The state of North Carolina is not among those states legally requiring that the members of legislative bodies be elected from compact districts (Grofman 1985). But given recent Supreme Court decisions, the compactness criterion has received renewed attention.

There is substantial legal and academic disagreement over the value of mandating districts be compact. First, requiring compact districts does not guard against the political or racial manipulation of electoral space. The geographic

resolution and quality of the data now provided by the census in conjunction with the increasing sophistication of computer technology may allow compact districts to be delineated which are also directly discriminatory to a population group. Thus, highly compact districts may be intentionally detrimental to a population group (see both Morrill 1981, and Grofman 1985).

Second, in the real-world perfectly compact districts are an impossibility. Most compactness indices assume that an optimal district will be a perfect circle, the most compact of geometric shapes. But if circles were employed to subdivide the space of a jurisdiction, some of the jurisdiction's area would not be allocated to districts, but be left in the gaps between circles. Thus, circular districts are an unrealistic abstraction without direct application to real-world circumstances.

Third, the building blocks of redistricting plans, blocks, block groups, tracts, or voting precincts, are frequently delineated by streets and are oftentimes square or rectangular in shape. The shapes of these building blocks therefore largely precludes circular districts from being formed.

A fourth concern limiting real world compactness is the constitutional criterion of equality of population discussed above. It is of substantially greater legal necessity to comply with this criterion than to create perfectly compact districts. To meet this constitutional criterion map makers may be forced to create districts of less than perfect compactness. In short, evaluations of the geographic compactness of political districts

must consider the constraints faced by the map maker with substantial attention focused upon local circumstances.

Compactness Indicators Used In This Report

There are a host of different geographic compactness measures available (see Niemi, et al., 1990 for a description of 24 different measures). In general these methods concentrate on a district's perimeter, areal dispersion, or population distribution in their design.

Two compactness measures are used in the present report, both of which are now among the most commonly recognized and applied by legal and academic scholars. Their elevated recognition is due largely to their calculation and application in a 1993 *Michigan Law Review* article by Richard Pildes (Professor of Law, University of Michigan) and Richard Niemi (Professor of Political Science, University of Rochester). Both authors are among the most recognized authorities on redistricting and the courts in the United States today. The purpose of their article was to measure the compactness of all congressional districts in the United States existing in 1993 in such a manner as to parallel the discussion in the Supreme Court's decision in *Shaw v. Reno* (1993). Adding to the relevance of this article and its methods was its citation in *Bush v. Vera*, 1996, as supporting evidence for the Supreme Court's findings that three congressional districts in Texas were unconstitutional.

The first measure is based on the geographic "dispersion" of a district. To calculate this measure a circle is circumscribed around a district. The reported coefficient is the proportion of the area of the circumscribed circle which is also included in the district and ranges from 1.0 (most compact) to 0.0 (least compact).

The second measure is based upon the calculation of the "perimeter" of the district. The reported coefficient is the proportion of the area in the district relative to a circle with the same perimeter and ranges from 1.0 (most compact) to 0.0 (least compact).

Pildes and Niemi (1993: 564) provide some guidance on the evaluation of both measures. With respect to the dispersion compactness measure, they suggest "low" is equal to or less than 0.15. On the perimeter compactness measure they suggest that "low" is equal to or less than 0.05. By suggesting these guidelines they caution that "we do not imply that all districts below those points, or only those districts, are vulnerable after *Shaw*." These cutoff points are therefore best characterized as general guidelines and they should not be employed as absolute indicators of acceptable or unacceptable levels of compactness. Supporting their statement is the fact that in 1998 ten congressional districts in the U.S. are below the 0.05 benchmark on the perimeter measure (e.g., New York's 12th (0.021) and Texas' 6th (0.027)), and 13 are below the 0.15 benchmark on the dispersion measure (e.g., Florida's 22nd (0.0331) and California's 36th (0.042)).

Some Theoretical and Real World Comparisons

In addition to the compactness scores for each of North Carolina's congressional districts, additional scores were calculated for hypothetical and real-world units. The purpose for calculating these additional scores is to provide comparisons for the evaluation of the compactness coefficients for North Carolina's congressional districts. Thus, Figure 3 displays a square circumscribed by a circle. While most would visually evaluate a square district as a highly compact, the geographic dispersion score for the square is .640, and its perimeter compactness score is .785. Similarly, Figure 4 displays a rectangle circumscribed by a circle. Again, while most viewers would visually evaluate a rectangular district as substantially compact, the dispersion compactness of the rectangle is .431 and its perimeter compactness is .641.

Table 2 provides further comparisons in tabular format with selected units also presented in Figures 5-9. Among those units for which the two compactness indicators were calculated are Camden, Davie and Swain counties, the cities of Greensboro, Charlotte and Winston-Salem, and two precincts each in the cities of Greensboro, Charlotte, and Winston-Salem. These additional compactness coefficients provide instructive comparators using real-world geographic units. But it must also be underscored that these units are not directly indicative of the constraints faced by those undertaking the redistricting process. For example, counties are not required to maintain equal populations and their initial geographic delineations were

not constrained by the need to aggregate smaller units of census geography such as tracts and blocks.

With the cautionary notes above in mind, the comparators provided in Table 2 are helpful to contrast the levels of compactness magnitude of real-world political units relative to the square and rectangle examples presented above. Secondly, these more real-world examples are indicative of the contrast in magnitude of the two compactness measures for the same jurisdiction, the perimeter compactness measure generally being lower in magnitude for such units. Thus while Charlotte's dispersion compactness measure is high at .571, its perimeter compactness coefficient is much lower at 0.079. Similar contrasts in the magnitudes of the two coefficients were also found to characterize both Greensboro and Winston-Salem.

The purpose for calculating the compactness coefficients of precincts in the three cities is to demonstrate the constraints posed by the building-block units used by the State of North Carolina in delineating its congressional districts. On the dispersion compactness measure the coefficients range from a low of 0.154 to a high of 0.297 (Table 2). On the perimeter compactness measure the scores range from a low of 0.114 to a high of 0.213. These measures are significant because building-block units of relatively low compactness will generally result in districts of lesser compactness than districts composed of highly compact building-block units.

Added Constraints Facing Map Makers Drawing Political Districts

As noted above, electoral district compactness must be evaluated with flexibly due to the greater number of constraints placed on the process of their formation. The compactness of a congressional district can be limited by a host of conditions beyond the control of the map maker. For example, many counties use meandering rivers as their boundaries. Thus a congressional district with boundaries following such county boundaries would likely have a limited degree of perimeter compactness. Secondly, simple geographic compactness indicators ignore real-world patterns of interaction, population homogeneity and travel.

Using the river example above, a geographically elongated district centered upon a riverine environment where patterns of employment and sociopolitical interaction are focused upon the river may be highly appropriate. Even more appropriate to the current situation is the focus of a district upon major transportation corridors such as freeways. As stated by Professor Morrill, the most distinguished political geographer in the United States with a long standing interest in the districting process,

> A too simplistic application of . . . geographic compactness measures is foolish, especially where the distribution of the population is uneven, perhaps strung out along roads or railroads. Travel may be easier and cheaper in some directions than in others, such that an

> elongated district astride a major transportation corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district.

This passage underscores that there are circumstances under which there are appropriate reasons for districts to be of lesser compactness. An excellent example is Florida's 22nd district (see Figure 12). It is described by Duncan and Lawrence (1997: 367) as

> a shoestring of a district hugging the south Atlantic coast from Juno Beach south to Miami Beach. It is roughly 90 miles long and in some places just a few blocks wide. Its width never extends beyond three miles.

This district reflects the reality that the beaches along central Florida's coast are peopled by comparatively wealthy families as compared to those only three or four miles from the coast. It is represented by Republican Clay Shaw, Jr., and to my knowledge has not been the target of any litigation. Its level of perimeter compactness is 0.0467, while it has the lowest level of dispersion compactness of any congressional district in the United States at 0.0331.

A second example pertains to Illinois' 4th district which has popularly been referred to as the "earmuff district." It has also been described as "C-shaped," "distended," as having an "uncouth configuration," and as resembling a "Rorschach ink blot" (Duncan and Lawrence 1997: 454). While most assuredly

contorted in its geographic design, this district was found to be constitutional by the Supreme Court on January 26, 1998 because it serves a compelling state interest. Its dispersion compactness coefficient is 0.1933, while its level of perimeter compactness is 0.0263. Its perimeter compactness score is the second lowest among congressional districts in the United States today (the lowest is New York's 12th district).

It must be stressed that legislators represent people, and the distribution of the population on the landscape is invariably uneven. Given this unevenness, and the desire to include a requisite number of people with similar social, economic or political orientations, among other competing goals, it is largely an impossibility to universally create districts of perfect theoretical compactness. Such an endeavor would be at odds with quality representation, and likely fruitless in result.

North Carolina's Congressional Districts

In 1992 the mean dispersion compactness of North Carolina's twelve congressional districts was 0.280, with the range being from a low of 0.045 for district 12 to a high of 0.440 for district 6 (Table 3). The mean level of dispersion compactness for the 1998 districts substantially increased to 0.354. While the 12th District continued to be the lowest among the state's 12 congressional districts, its dispersion compactness more than doubled to 0.109. Secondly, this level should be evaluated in light of the district's focus upon major transportation corridors including Interstates 40, 77 and 85. District 7 had the greatest level of dispersion compactness at

0.622. It should be noted that District 7's level of compactness is nearly that of the square displayed in Figure 3.

In 1992 the mean level of perimeter compactness for North Carolina's twelve districts was 0.095 (Table 3). The perimeter compactness coefficients ranged from a low of 0.014 for the 12th district to a high of 0.319 calculated for the 4th district. The mean level of perimeter compactness for the 1998 districts is a substantially increased 0.192. These coefficients ranged from a low of 0.041 for the state's 12th district to a high 0.325 for the 7th district. Again, the 12th district's level of objective geographic compactness should be evaluated in light of its focus upon major transportation corridors in the area.

Table 4 presents the absolute and percentage change in the levels of compactness on both the dispersion and perimeter measures for North Carolina's 12 congressional districts. The average district in North Carolina increased its level of dispersion compactness by 0.075 or 39.1%. The increase in the level of District 12th's dispersion compactness was greatest at 142.2%. District 6's level of dispersion compactness actually fell by nearly 18 percent. This finding underscores that changes in one district very frequently lead to changes in other districts, and the direction of such successive impacts will not necessarily be in the desired direction.

The average level of perimeter compactness for the state's 1998 districts is also well above what existed in 1992 (Table 4). The mean district's level of compactness rose 0.097

or nearly 172%. District 7's increase was the greatest at 525%. District 4's perimeter compactness fell by over 13%.

North Carolina Compared to Other States

Other states have made adjustments to their congressional districts since 1992 because of litigation similar to that experienced by North Carolina. Table 5 compares the means for both compactness indicators in 1992 and 1998 for the state's of North Carolina, Florida, Georgia and Texas. These coefficients are invaluable because they suggest the degree of change impacting all districts within each state. In short, the redrawing of a single district may impact most other districts in a state. Thus, while North Carolina's 12th district was a principal focus of legal challenges, no district in the state was left untouched by the changes to its design.

North Carolina's mean dispersion compactness coefficient is 0.354 for the 1998 districts, higher than both Florida and Texas (Table 5). Its mean dispersion compactness rose by 0.074, or 26.4% between the 1992 and 1998 plans. This mean increase in compactness was the greatest of the four states examined.

North Carolina's mean perimeter compactness coefficient is 0.192 for the 1998 districts, higher than that for Texas (0.164) and similar to that calculated for Florida (0.207) (Table 5). In terms of absolute change, North Carolina's mean level of perimeter compactness rose from 0.095 to 0.192, or by 0.097. In terms of both absolute and percentage change, this

level of increase was the greatest among the four states examined, doubling the percentage increase of second place Georgia.

Table 6 specifically compares the levels of compactness for North Carolina's 12th congressional district with other challenged districts in North Carolina, Florida, Georgia, Illinois and Texas. As can be ascertained from the Table, the increase in the 12th district's level of dispersion compactness is second only to Georgia's 11th district among those examined. While the 12th district experienced the second smallest level of increase among the set of districts considered on the perimeter compactness measure, its increase was substantial at 192.9%.

The levels of compactness for North Carolina's twelve districts are substantially increased in the 1998 districts as compared to the 1992 districts. Thus, the system as a whole experienced a substantial increase in compactness. At present eleven of the state's twelve districts are above the benchmarks suggested by Niemi and Pildes (1993) as indicative of "low" compactness. While the 12th congressional district's level of compactness remains marginally below the suggested benchmarks, its level of increase is substantial and is comparable to that of redrawn districts in other states. Secondly, and in reference to the earlier quote by Professor Morrill, evaluations of the 12th district's geographic compactness should also consider its travel time compactness. Travel times are rarely a direct function of straight line distances. Rather the available travel modes and directness of traffic corridors between points must also be considered. Thus

it is highly probable that the time needed for the 12th district's representative to travel to meet constituents at opposite ends of the district is substantially less than in many if not most other more geographically compact districts.

5) Continuity of Representation.

It is counterproductive to fundamentally alter the system of districts in a state each time new districts are delineated. Wholesale change may lead to voter confusion and frustration, and thus non-participation. While the goal of preserving the integrity of the district system may be difficult if a state has experienced substantial population growth in the decennial districting cycle, boundary "stability helps to develop and maintain a sense of identity with districts" (Morrill 1981: 27). The goal of maximizing the continuity of representation is particularly important when changes occur in the middle of the normal decennial redistricting cycle. Thus the voters of the state of North Carolina have now experienced two significant changes to their district association in the past seven years, with a third necessarily coming for the 2002 election cycle.

It is clear that the 1998 congressional districts are significantly different from those employed in the elections of 1992, 1994, and 1996. It is also clear that effort was expended to maintain the geographic cores of the 1992 districts in the 1998 remap. Table 7 presents the proportion of each district's area in 1992 which remains in the 1998 districts. On average 76.4% of the area in each of the state's twelve districts in 1992 was preserved in the 1998 districts. This proportion ranges

from a high of 96.7% for the 11th district to a low of 41.6% for the 12th district. Thus, the 12th district was more dramatically redrawn than any other district in the state. By comparison, when Florida's 3rd district was redrawn under similar circumstances, 48.4% of the area of the early 1990s district was preserved in the current district (see Figures 10 and 11).

The changes created by the redrawing of North Carolina's congressional districts also shifted one-quarter of the state's population to a different district, a very substantial movement of the population between districts even for a decennial redistricting (Table 8). The impact on individual districts ranged from a low of 7.6% of District 11's population being shifted, to a high of 40.5% for District 2's population. Districts 1, 2, 4, 5, and 12 all had more than 30% of their residents shifted to another district in the 1998 remap. Clearly, such substantial shifts from one representative to another can be unsettling for many constituents.

Attention to balancing the legal necessity for change with the interests of those represented is appropriate in all districting cycles, but most particularly for those changes in the middle of the normal decennial cycle. The changes in the 1998 districts as compared to the 1992 districts cannot be characterized as minimal. Rather I would characterize the change as moderate because attention was paid to maintaining the geographic cores of the 1992 districts (I would characterize extreme change as a plan that paid no heed to the existing geographic cores of the former districts). Thus, on this criterion I evaluate the efforts of those producing the remap

favorably because of their balance in complying with the June 1996 court order while preserving a moderate level of continuity of representation for residents of the state's twelve congressional districts.

Conclusions

The purpose of this report was to examine the twelve 1998 congressional districts in the state of North Carolina from the perspective of five traditional redistricting criteria. Where appropriate the current districts were compared with those first used in the 1992 congressional elections. The findings of this report are summarized below.

1) Equal Population.

The total deviation of the 1998 districts is 0.270%, well below the generally accepted guideline of less than 1.0%. Thus the present districts are evaluated positively on this criterion.

2) Contiguity.

All twelve of North Carolina's 1998 districts are contiguous and are therefore evaluated positively on this criterion. Secondly, the level of practical contiguity in the 1998 districts is substantially increased over that existing in the 1992 districts, particularly as this criterion relates to the 6th and 12 districts. Thus, when considering the change between the 1992 and 1998 districts, the current plan is evaluated very favorably.

3) The Allocation of Local Government or Electoral Units.

The 1998 districts reduce the number of divided counties from 44 in 1992 to 22 at present. This is a substantial reduction and the present plan is therefore evaluated favorably from this perspective. Secondly, the 1998 districts effectively employed voting precincts as building blocks with only 2 of the 2,531 census defined precincts in the state being divided. Of the 31 counties not subdivided by census defined voting precincts, only one was divided in the districting process. In this case (Beaufort County), township boundaries were used, which are far better building blocks than census blocks or tracts.

4) Geographic Compactness.

The level of compactness determined for the 1998 districts is substantially improved over that existing in the 1992 districts. At present only the 12th congressional district is marginally below the suggested guidelines for judging "low" compactness. But such judgements should also consider the rate of change for the 12th, which was found here to be very substantial and in line with the magnitude of change experienced for other districts ordered redrawn by the court system. Secondly, the 12th's level of compactness is similar to other existing districts not under challenge (e.g., Florida's 22nd, see Figure 12), and at least one district found constitutional by the Supreme Court (e.g., Illinois' 4th). Finally, Professor Morrill's 1981 argument that elongated districts which center

upon transportation corridors may be highly compact in terms of travel time is pertinent.

5) Continuity of Representation.

The redrawing of North Carolina's 1992 congressional districts introduced substantial change in the state's system of representation. On average, 24% of the area in the 1992 districts was allocated to a different district on the 1998 map. Most dramatic was the impact upon the 12th congressional district - the 1998 district includes only 42% of the original area of the 1992 district. Similarly, nearly 26% of North Carolina's population was moved to a different district in the 1998 plan as compared to the 1992 map. The magnitude of this change is substantial, most particularly in a mid-decennial redrawing of the state's congressional districts. In short, those undertaking the remap appear to have sought balance between the necessity of district boundary change and the preservation of representational continuity.

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EXHIBIT 426 (EXCERPTS)

ADDENDUM TO "AN EVALUATION OF NORTH CAROLINA'S 1998 CONGRESSIONAL DISTRICTS [1997 PLAN*]"

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In February 1998, I submitted an evaluative report to the North Carolina Department of Justice which included an examination of the geographic configuration of North Carolina's congressional districts as delineated in the state's 1997 plan. The districts evaluated were intended for use in the 1998 congressional elections though subsequently replaced due to the litigation in *Cromartie v. Hunt* (E.D. NC). In late August 1999 I was again contacted by the North Carolina Department of Justice and informed that the case was proceeding to trial. At that time I was asked to consider the results of additional *Shaw* related cases on district compactness in other states since the submission of my report in early 1998. This addendum is intended to update my report in terms of district compactness changes due to *Shaw* related litigation in other states since that time. It therefore specifically relates to the subsection in my report entitled "North Carolina Compared to Other States" (pp. 21-23) and Tables 5 and 6.

Since the submission of my original report the states of Virginia and New York have undergone *Shaw* related litigation which resulted in the redrawing of some congressional districts in both states. In New York the 12th congressional district was challenged, eventually found unconstitutional, and redrawn in advance of the November 1998 elections. In Virginia the 3rd congressional district was challenged, found unconstitutional, and redrawn prior to the November 1998 congressional elections. It is the purpose of this addendum to present the level of change in congressional district compactness resulting from these cases in comparison format.

The data used in this addendum were secured from Election Data Services, one of the country's most prominent providers of data on elections and districts. Election Data Services also provided the bulk of the data used in my earlier report. The data presented here are therefore directly comparable to those employed in my 1998 report. The data secured from Election Data Services were computer files ("district shape files") delineating the geographic extent of all districts in New York as existing in 1992-1996 and 1998, and in Virginia as existing in 1992, 1994-1996 and 1998.

The state of Virginia undertook voluntary technical adjustments to multiple congressional districts in 1993 to avoid splitting newly defined voting precincts. Due to these adjustments, either the 1992 or 1994-1996 districts (hereafter referred to as the "1994 districts") might be employed to gauge changes in district compactness. As a result, two sets of calculations are offered for districts in the state of Virginia.

First, the change during the entire period from 1992 to 1998 are calculated. Second, the compactness change in Virginia's districts between 1994 and 1998 are calculated. In my opinion the calculations for the period 1994 to 1998 are more relevant for assessing litigation induced change in the levels of compactness associated with Virginia's congressional districts.

For the purposes of this analysis, the levels of compactness for all districts in both states were calculated for each of the relevant benchmark years by the University of Alabama Cartography Laboratory. The results of these calculations are presented in "Addendum Table 5" and "Addendum Table 6." Maps are included of New York's 12th congressional district before and after changes were made to comply with the court decision (Figures A1 and A2). Three maps are included of Virginia's 3rd congressional district reflecting its original configuration in 1992 (Figure A3), its geographic extent after voluntary technical adjustments were made by the state in 1993 (Figure A4), and depicting its shape after it was redrawn as a result of litigation for use in the 1998 congressional elections (Figure A5).

RESULTS

In 1992 (districts used from 1992-1996) the mean dispersion compactness of North Carolina's twelve congressional districts was .280, lower than for New York's 31 districts in 1992 (.307) or Virginia's eleven districts in either 1992 (.314) or 1994 (.313) (see Addendum Table 5). But the mean dispersion compactness of North Carolina's districts

(.354) in the 1997 plan was above the levels in the 1998 districts for either New York (.322) or Virginia (.340). Thus, in absolute terms North Carolina's post-*Shaw* districts as delineated in the 1997 plan were on average of greater dispersion compactness that those in either New York or Virginia after similar court challenges. While the average North Carolina district increased its level of dispersion compactness by 26.4% (1992 districts versus 1997 plan districts), the average New York district had its dispersion compactness increased by 8.1% between 1992 and 1998. Similarly, the average Virginia district had its level of dispersion compactness increased by 8.6% between 1994 and 1998.

In 1992 (districts used from 1992-1996) the mean perimeter compactness of North Carolina's districts was .095, significantly less than the means for New York (.204) or Virginia (.185) (see Addendum Table 5). But the North Carolina districts as redrawn in the 1997 plan had an average level of perimeter compactness of .192, above the mean for Virginia's redrawn 1998 districts (.190), though below the mean for New York's 1998 redrawn districts (.220). The average rate of improvement on this compactness measure for North Carolina's twelve districts between 1992 and the 1997 plan was 102.1%, several times the rate of improvement in either New York (+7.8%) or Virginia (+6.7%).

The rate of change in the specifically challenged districts in the three states also underscores North Carolina's efforts to redraw its districts after *Shaw* in the 1997 district

plan. For example, North Carolina's 12th district in the 1997 plan increased its level of dispersion compactness by 142.2% from its level in 1992. This compares to the 107.3% increase in New York's 12th between 1992 and 1998, and a -10.5% decline in the dispersion compactness of Virginia's 3rd congressional district between 1994 and 1998. In terms of the rate of change in the levels of perimeter compactness, North Carolina's 12th congressional district in the 1997 plan increased 192.9% from its geographic configuration in 1992. This was over three times the rate of increased perimeter compactness of Virginia's 3rd district (+60.0%) between 1994 and 1998, though less than the rate of increase in New York's 12th (+361.9%) between 1992 and 1998.

CONCLUSIONS

The purpose of this addendum was to add two comparison states to my original report as submitted in early 1998. The above analysis indicates that the rate of increase in the levels of geographic compactness for districts in North Carolina's 1997 plan is quite comparable if not significantly better than that accomplished by New York and Virginia in the court mandated redrawing of their districts prior to the 1998 congressional elections.

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EXHIBIT 429

THIRD AFFIDAVIT OF DAVID W. PETERSON, PHD

[Caption omitted in printing]

DAVID W. PETERSON, PHD, being duly sworn, deposes and declares the following:

Identity

1. As indicated in my first affidavit, I am president of PRI Associates, Incorporated, a company whose chief activity is providing statistical litigation support. I am also a retired statistics professor. Further detail about my qualifications is set forth in my first affidavit, and in the resume attached to that affidavit.

Assignment

2. I am retained in this matter by the defendants to respond to and comment on several issues raised by plaintiffs in their Motion in Limine to Exclude the Testimony of David West Peterson ("Motion in Limine"). In particular, these issues are

a. The key requirements of a logical and scientific demonstration that race was the predominant factor in the defendants' choice of a congressional district boundary;

b. Statistical precedents for my analysis;

c. The effect of anomalous data on my analysis;

d. The meaning of testability in the context of a scientific inquiry;

e. Various assertions by plaintiffs in their Motion.

Conclusions

3. For reasons set forth below, it is my opinion that

a. To support plaintiffs' case, a statistical analysis must demonstrate that the empirical evidence is statistically significantly incompatible with the reasons advanced by the defendants for their choice of boundary, and that there is no apparent reason other than race that accounts for the boundary. There has been no such demonstration in this case of which I am aware, and none of the variations on my analysis suggested by plaintiffs constitutes such a demonstration. The import of all of my analysis as well as those variations suggested by plaintiffs is that race and party affiliation are almost indistinguishable as explanations for the boundary of the Twelfth Congressional District defined in 1997 Senate Plan A. That overall result supports the defendants' case; it does not support the plaintiffs' case.

b. Plaintiffs argue that my segment analysis, as they call it, is without precedent and partly for that reason should not be admitted into evidence. On the contrary,

that analysis is based on three operations used throughout not only the theory and practice of statistics but also in everyday life. These operations are (i) the comparison of two numbers to determine which is greater, (ii) the counting of a number of objects, and (iii) the calculation of simple percentages. Such methods are central to an entire branch of statistical methods called "non-parametrics," which includes several measures of correlation which, like the one I use in my analysis, are based on counts and percentages. As statistical applications go, my segment analysis is very straightforward and easy to understand, and there is little danger that a trier of fact will accord it either more or less evidentiary weight than it deserves.

c. Plaintiffs point out that the data on which my analysis is based contain several anomalies. There are some precincts for which the numbers of registered voters exceed the numbers of residents of voting age, and some precincts for which the numbers of people in the different racial categories sum to a number different from that stated as the total. Plaintiffs also point out that while Davie County does have precincts within each of which voting results are tallied, the details of those tallies in that one county are not used in my study. Plaintiffs are correct in suggesting that this indicates an inconsistency between the actual numbers of people in a precinct at a given moment in time and the numbers in the data file on which my studies are based. But such inconsistencies are completely

irrelevant if, as is represented to me, the data used by the General Assembly in choosing congressional district boundaries are the data on which my analysis is based. The issue here is not whether the Assembly used correct data, it is whether, using whatever data they used, the Assembly relied predominantly on racial information contained therein. Therefore, the data anomalies noted by plaintiffs are irrelevant and should not be a basis for excluding my testimony.

d. Plaintiffs argue that because the particular type of analysis I use has not been used in exactly the same form in previous cases or in published literature, it should be excluded because it is "untested." This argument misconstrues the meaning of testability almost surely intended by the Court in *Daubert*. In using this term, the Court was referring to the quality of a proposition that permits its truth to be ascertained either by logical inference or by experimental observation. My method of analysis poses a testable question: Does race provide a statistically significantly stronger explanation of the boundary of the 12th District than does party affiliation? The answer is, it does not; the two factors provide about equally complete explanations, and of the two, the party affiliation explanation is marginally more complete. There is no indication that race predominated over party affiliation in the drawing of the boundary.

e. Many of the assertions made by plaintiffs in their Motion are either misleading, wrong or irrelevant; the details are provided in paragraphs 18 - 37 below.

Underlying Data

4. In reaching the above conclusions, I rely on the October 18, 1999 Plaintiffs' Motion in Limine to Exclude the Testimony of David West Peterson and the same computerized data base on which my first affidavit is based.

Requirements for Demonstrating that Race was Predominant

5. There is a standard statistical paradigm for interpreting circumstantial data to determine whether they suggest that race may have influenced a group of decisions. This paradigm is widely used in employment discrimination (e.g., *Hazelwood School District v. United States*) and jury selection (e.g., *Castaneda v. Partida*) litigation. This paradigm is as follows. An idealized decision process not based on race is hypothesized, and the data are examined in light of this hypothesized model. If the data are statistically significantly inconsistent with the model in a manner correlated with race, one concludes that the model does not accurately reflect the actual decision process, and that some additional factor correlated with race (if not race itself) influenced the actual decision process. In the absence of a non-discriminatory justification for the inconsistency, the inference is raised that the decisions were influenced at least in part by considerations of race.

6. As applied to the matter of drawing the boundary defining a congressional district, one form of this paradigm is to ask first how well a proposed boundary correlates with party affiliation, second, how well it correlates with racial identity, and finally, whether the correlation with race is significantly stronger than the correlation with party affiliation. If it is not, the proper conclusion is that, by this statistical measure, race appears not to have predominated over party affiliation in the drawing of the boundary. If race did not predominate over party affiliation, then clearly it was not the predominant factor in the choice of the boundary.

7. Note that, as with nearly all analyses of circumstantial evidence, one cannot conclude unequivocally either (i) that race played no role in the choice of boundary or that (ii) it did play some role. The most that can be inferred from any objective analysis of circumstantial data is that it tends to support a particular one of these propositions more strongly than the other. Dr. Weber's positive conclusion that "race was the predominant factor" is simply not within reach of objective science.

Precedents for My Analysis

8. My segment analysis, as plaintiffs' call it, is just a systematic tallying of the characteristics of the segments forming the boundary of the 12th District. Compared with such common statistical procedures as regression analysis or Fisher's Exact Test, it is very straightforward, easy to understand and unlikely to mislead. It also has the virtue that it lends itself easily to calculations of statistical significance,

though in this case that is not necessary because the results are so nearly perfectly balanced between the race and party hypotheses.

9. The use of tallies as the basis for examining and interpreting empirical data is well-established in both theory and practice. See E. L. Lehmann, *Nonparametrics: Statistical Methods Based on Ranks*, Holden-Day, 1975 for an extensive account of statistical methods of analysis based on counts of binary comparisons.

Effects of Data Anomalies

10. Plaintiffs point out that the data on which I rely are anomalous in several respects, namely:

There some precincts for which the numbers of registered voters exceed the numbers of residents of voting age,

There are some precincts for which the numbers of people in the different racial categories sum to a number different from that stated as the total, and

While Davie County does have precincts within each of which voting results are tallied, the details of those tallies in that one county are not used in my study.

11. The reason that the number of registered voters in a precinct might exceed the number of people of voting age who reside there is that the numbers come from two different sources, and probably pertain to two different times. The population data come from the 1990 US census, and reflect the population as of April 1990. The voter registration counts are

from some date unknown to me, but I have no reason to believe that it is April 1990. More importantly, the voter registration counts probably include people who once lived in the precinct but who have since moved away. There is no practical way to keep a precinct's list of registered voters absolutely current; it will almost always overstate the actual number of voters actually eligible to vote in the precinct.

12. The reason that in some precincts, the numbers of black, white and other voters do not add up to the total number of voters is most likely due to the manner in which the precinct level data were distributed when constructing the data base. Each precinct is a geographic area comprising one or more smaller geographic areas called blocks. Blocks are standard geographic units defined and used by the US Bureau of Census for reporting the results of the decennial census. The various voter counts for a precinct were allocated among its blocks, and the counts falling within a block were rounded to the nearest whole person. For example, in a precinct having 100 black registered voters and three blocks, this allocation process might assign 23.33 black voters to the first block, 40.33 to the second, and 36.33 to the third. Rounded off, these numbers become 23, 40 and 36. In processing these data, the first step taken by the computer programs used by the State and by me is to add up the counts for all the blocks in a precinct to obtain the totals for that precinct. In this case, the total is 99, not the original 100. In like fashion, the number of white voters associated with the precinct may be altered, the number of other minorities, and the total number of registered voters. Thus a precinct's numbers of black, white, other minority and total registered voters might be transformed from, say, 100, 500, 10 and 610, respectively, to

99, 498, 11 and 612. The former numbers add up (100 + 500 + 10 = 610) but the latter do not (99 + 498 + 11 = 608, not 612).

13. In Davie County, voters register and vote in geographic areas called precincts just like they do in other counties. However, the data in the file on which the General Assembly and I rely do not reflect these data precinct by precinct. Instead, the precinct level data for Davie County apparently were aggregated up to the county level, and then allocated to the minor civil divisions (MCDs) into which the county is partitioned. An MCD is an entity defined by the US Bureau of Census, and it consists of one or more blocks. The allocation of county-wide voter data in Davie County to its MCDs was done in such a way that every MCD appears to have the same fraction of republican and democratic voters. While this is almost surely not true, it is the way the file was constructed.

14. While the anomalies cited in 11 - 13 above put the data somewhat at odds with reality, they have no effect whatsoever on my inquiry. The General Assembly used these data, however anomalous, to define the 12th District, and the central question is whether, when using these data, the Assembly used the racial information contained therein as the predominant factor in setting the course of that boundary. I have used these same data, however anomalous, to determine whether race or party affiliation correlate better with that boundary. The presence of these anomalies in no way tarnishes my analysis, or renders it less probative than it otherwise would be.

The Meaning of "Testability"

15. The Supreme Court in *Daubert* indicated that one factor that might bear on a trial court's inquiry into the suitability of proffered expert testimony is "[w]hether a theory or technique can be and has been tested." The Court here was surely referring not to the extent to which a theory or technique has been used in the past, but rather to the extent to which it can be shown empirically or logically to be true or correct.

16. As an example, consider the technique used by plaintiffs' expert, Dr. Weber. It fails to pose a testable question. Dr. Weber merely collects data tending to support the proposition that race was the predominant factor in the construction of the 12th District. His technique does not entertain any alternative to that proposition, and therefore is doomed to produce the conclusion that race was the predominant factor. Had he applied his method of analysis, without change, to political affiliation instead of race, he would have been forced to conclude that political affiliation was the predominant factor in the construction of the 12th District.[1] Since it is not possible for both of these propositions to be true, there must be something wrong with Dr. Weber's method of analysis. The flaw is that he does not pose a testable question.

[1] I have verified that this is so by recreating Dr. Weber's tables using party affiliation instead of race. Not only does one conclude, by Dr. Weber's methods, that political affiliation was the predominant factor in the construction of the 12th District, one concludes that political affiliation was also the predominant factor in the construction of the 1st District.

17. My analysis poses three testable questions:

To what extent does race correlate with the boundary of the 12th District?

To what extent does party affiliation correlate with the boundary of the 12th District?

Of the two correlations, does that with race predominate?

I answer those questions, objectively.

Miscellaneous Issues

18. Motion in Limine, p. 3, Note 1: Plaintiffs' complain that in calculating the fraction of a precinct's registered voters who are republicans and the fraction who are democrats, I excluded from the denominators people who were neither republicans nor democrats, namely the independents. This is true, and I did it purposefully to keep those percentages directly analogous to all other percentages I used in my analysis. Nevertheless, I reran all of my segment studies using percentages calculated by including people registered as independents, as plaintiffs imply I should, and there is not one single segment among the 234 constituting the border of the 12th District whose qualities are altered. In this case, the issue raised by plaintiffs not only has no material effect on my analysis, it has no effect whatsoever.

19. Motion in Limine, p. 4: Plaintiffs claim that I have assigned each MCD in Davie County the same composition of voters, but that is not true. The data base I was given already contained that assignment; it was not something I did.

20. Motion in Limine, p. 5, Note 4: Plaintiffs raise the specter of a segment having "2,000 African-Americans out of 3,000 total population in the inside precinct and 5 African Americans out of 30 total population in the outside precinct." Only five of the 234 segments bordering the 12th District involve population disparities comparable to these counts, and these are the five excluded from most of my analysis because they do not have complete information about party affiliation. No precinct among the 229 used in most of my studies has fewer than 614 people, and most have several thousand.

21. Motion in Limine, p. 8: Plaintiffs assert here, with reference to my twelve race-party pie chart comparisons, that "if there were more Type R divergent segments than Type P [in a given one of the twelve pie charts] [I] concluded that the combination supported the Race Hypothesis." This is an overstatement. My testimony was and is that in all twelve charts, there is an almost even division between segments favoring the Race Hypothesis and those favoring the Political Hypothesis; in no chart does one type predominate over the other to a statistically significant extent. On balance, there are a few more segments favoring the Political Hypothesis than the Race Hypothesis.

22. Motion in Limine, p. 9: Plaintiffs suggest that it would be appropriate to exclude segments from my analysis that border Davie County. I can think of no principled basis for doing so. The Davie County MCD data, right or wrong, are the data available to the General Assembly through its computer system and on which I understand it relied.

23. Motion in Limine, p. 9, Note 6: Plaintiffs indicate that if the Davie County segments were removed from my analysis, then the number of remaining segments that are unequivocal in their support of the Race Theory would be four, while the number unequivocal in support of the Political Theory would be three. However, this does not make plaintiffs' case; it leaves the two theories virtually indistinguishable, just as they are under my analysis. An imbalance of four to three is not statistically significant, and does not suggest that race is a significantly more complete explanation for the boundary than is party affiliation.

24. Motion in Limine, p. 10: Plaintiffs make much of the fact that, at my deposition, I could not recite the locations of the various segments. The locations of the segments are well-documented and not at all ambiguous. I just happened not to have that documentation at hand at my deposition.

25. Motion in Limine, p. 17: Plaintiffs assert that "Peterson's calculations and results cannot be independently verified." That is absurd. My affidavits explained what we did, and we gave plaintiffs the computer program detailing exactly what we did down to the last digit. My work is 100% verifiable on the record provided to plaintiffs.

26. Motion in Limine, p. 18: Plaintiffs assert that my segment analysis has not been subject to peer review. It is at the moment being subjected to very careful review by plaintiffs, and as yet they have not set forth any sustainable objection to it. Furthermore, the Supreme Court had no difficulty understanding my analysis; indeed, the Court gave it

considerable credence in reaching its opinion. The analysis answers the questions asked of it, and the answers do not help plaintiffs. Furthermore, the questions posed by plaintiffs' expert Dr. Weber are so inartfully and unscientifically phrased that the answers he obtains do not help plaintiffs either.

27. Motion in Limine, p. 18: Plaintiffs make much of the fact that at my deposition I

did not recall that some precincts involved in my study were non-contiguous. Whether they were or not and how they were treated in my study are both well-documented and perfectly logical; it is of no importance that, in the absence of that documentation, I did not recall the details at my deposition.

28. Motion in Limine, p. 18: Plaintiffs assert that I "did not bother to look at the differences in race and party in the convergent segments, and thus arbitrarily discarded approximately 80% of [my] segment observations." That is not true. I did three types of analysis. In the first of the three, I used all of the segments, both convergent and divergent. It was that study that produced the observation that almost 80% of *all* segments have a higher representation of African-Americans inside than out, and that slightly more than 80% of them have a higher representation of democrats inside than out. In the second and third studies, I set aside the convergent segments and studied only those for which the race-party qualities diverge.

29. Motion in Limine, p. 19: Plaintiffs assert that "Of a total of twelve differing measurements, [I] report that seven result in a pattern of divergent boundary segments favoring the

political hypothesis over race, three result in a pattern favoring the race hypothesis over the political, and two result in a pattern equally strong for both. … These variable results show the unreliability of the analysis." This is absurd. Each of the twelve analyses conveys essentially the same message: Measure how you will, there is almost the same level of support for the race hypothesis as for the political hypothesis. Twelve times that same message is repeated. That is a highly consistent and reliable result. On balance, the data tip slightly in favor of the party hypothesis, but these twelve comparisons are in no sense inconsistent.

30. Motion in Limine, p. 19: Plaintiffs again suggest that it would be proper to cast out the three of my twelve comparisons that use voter registration to identify party preferences, and also to cast out the segments bordering Davie County. While there may be a good argument for according the three voter registration comparisons less weight than the others, I do not think they should be ignored altogether.[2] I can think of no valid reason for excluding the Davie County segments.

31. Motion in Limine, p. 21: Plaintiffs assert that I am not qualified to testify as a political scientist, a point I do not dispute. I am a statistician, and my task is to comment on the quality of Dr. Weber's statistical reasoning, and to assess the statistical evidence bearing on the issue of whether race was the

---

[2] If one does cast out all comparisons based on party affiliation according to voter registration, the number of unequivocal divergent segments increases from ten to twelve, seven of which favor the Party Hypothesis.

predominant factor in the construction of the boundary of the 12th District.

32. Motion in Limine, p. 22: Plaintiffs assert that "segment analysis" has no non-judicial usefulness. That's rather like saying that adding up yesterday's laundry bill has no usefulness outside of that one transaction. In a sense that is true, but it is a trivial sense. My analysis is founded on widely used and accepted principles involving (i) calculating percentages, (ii) comparing two numbers to determine which is greater, and (iii) counting up the number of items that have certain properties. Such operations underlie several commonly used methods for statistical analysis, including the calculation of certain kinds of correlations. Furthermore, they provide a foundation for calculations of statistical significance, should that be necessary. (In this case it has not been necessary, since the balance between race and political theories is so close, and generally tipped slightly in favor of the political.)

33. Motion in Limine, p. 23-4: Plaintiffs assert, following its argument that all Davie County segments should be withdrawn from my analysis, that my segment analysis would not support my final conclusion. They claim that the final count of unequivocally divergent segments would total seven, of which four tip in favor of the race hypothesis. But such a result is highly consistent with my results – the proper statistical conclusion is that there is virtually no difference in the amount of evidence supporting each of the two theories. In that case, plaintiffs still fail to demonstrate that race was the predominant factor, because it clearly does not predominate over the factor of party affiliation. Left moot is the possibility

that there may be additional factors over which race does not predominate – for purposes of deciding this case it suffices to show that there is at least one such factor, and I have done so.

34. Motion in Limine, p. 23, Note 17: Plaintiffs note that in Charlotte's Precinct 77, the data base indicates that 515 votes were cast for the democrat in the 1988 Lt. Governor election, and 217 votes for the republican. In contrast, a paper document attached to the Motion indicates that there were 1257 votes from that precinct for the democrat and 529 for the republican. According to the first set of figures, 515 /(515 + 217) = 70.4% of the votes cast from that precinct were for the democratic candidate. According to the second set of figures, 1257/ (1257 + 529) = 70.4% of the votes cast from that precinct were for the democratic candidate – the same percentage as that obtained from the first set of figures. Thus it makes no difference at all to my analysis which set of figures is used. I used the ones that were available on the computer data file that linked into the program I believe was actually used to construct the 12th District.

35. Motion in Limine, p. 24: Plaintiffs assert that my testimony is not relevant. On the contrary, it seems highly relevant to me that the court know the answers to the following questions:

To what extent does the boundary of the 12th District correlate with race?

To what extent does the boundary of the 12th District correlate with party affiliation?

Does race correlate with the boundary to an extent significantly greater than does party affiliation? That is, does the statistical evidence suggest that race predominated over party affiliation in the definition of the 12th District?

36. Motion in Limine, p. 27: Plaintiffs assert that "[i]t is startling that [I don't] even know where any of the particular precincts in [my] segments actually are on the map." The 234 segments and their relationship to the precincts bordering the 12th District are both logical and well-documented. With a properly annotated map and documentation in hand, anyone can trace the connections. Plaintiffs refer here to what I was able to recollect from memory at the time of my deposition, without that documentation at hand.

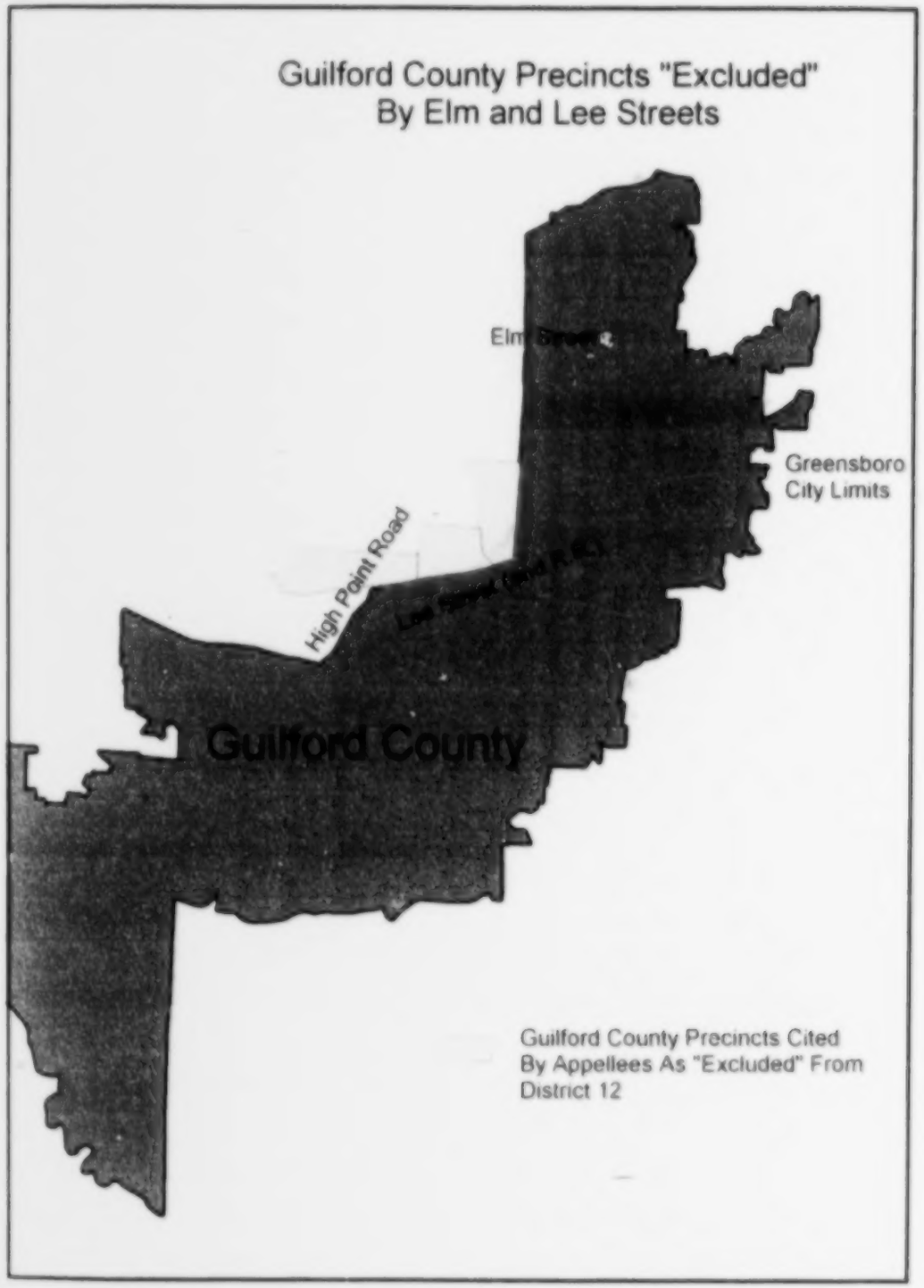
37. Motion in Limine, p. 27: Plaintiffs assert that my segment analysis has no practical relevance to the actual decisions made to include or exclude particular precincts along the boundary of the 12th District. I disagree. In an employment discrimination case, one may compare the average pay of women in a job to that of the men. The difference in those averages is a clue to whether the employer discriminates by gender. The employer may never have done that calculation, but that does not mean that the calculation is irrelevant to the issue of discrimination. In like fashion, the correlation of the boundary of the 12th District with race is highly suggestive of the extent to which race may have been a factor in its definition. It is absurd to hold that this correlation is irrelevant.

Further the Affiant saith naught.

/s/ David W. Peterson, PhD

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DON NICHOLS BAKER DEPOSITION (EXCERPTS)

[*4] . . . If you would state your name, residence, occupation?
A My name is Don Nichols Baker. I am District Director with the office of Congressman Melvin Watt, 12th District North Carolina.

* * *

[*4] Q Did you say your title was District Director for Mr. Watt?
[*5] A That is correct.
Q What are the duties of that position?
A We have three district offices, fixed offices, in the present district: one in Winston-Salem, North Carolina, one in Salisbury, North Carolina, and one in Charlotte, North Carolina, and a number of satellite offices that works out of those fixed offices.

My responsibilities is constituent services, to provide services to the residents of the 12th Congressional District. We work with individuals on cases, primarily federal government agencies, IRS, INS, those type of issues. We also try to provide the residents of the 12th District with information that is coming from the federal government, grants--notices to let them know that there are grants available to them, municipalities, working with the municipalities within those cities and towns within the 12th District.
Q How many people are in Mr. Watt's office altogether?
A We have two individuals in the Winston-Salem office, two in the Salisbury office, and five including myself that would be in the Charlotte office.

Q And how long have you worked for Mr. Watt?
A I have worked in this capacity since January of '93.

* * *

[*6] Q Now, we have been notified that you are an expected witness at the trial which is scheduled to take place sometime in November. Do you have any knowledge of what you are expected to testify about, the general area?
A I have worked enough years in the Mel Watt for Congress campaign, so I have been campaign manager and worked in terms of election process, trying to ensure that we have enough numbers to win the election.

* * *

[*7] Q You worked in that capacity as--were you a paid staff person in the campaign or just a volunteer or in what capacity?
A In '92 I was a paid staff person. In '94 I was a paid staff person. That is correct.
Q And in '98 also?
A In '98 also.
Q And in each instance you were the manager?
A I was the deputy manager in '92, the manager in '94, the manager in '98.

* * *

[*49] Q How about in terms of newspapers? What newspaper advertising were you doing in the '94 campaign and

what were you doing in the '98 campaign by way of comparison?
A In the '98 campaign we did use some newspapers. As a way to target voters we generally do not buy newspapers because we just don't think it is a good way to go out and make a direct appeal to voters. However, we did purchase some newspaper ads in some newspapers in the district.
Q Like *Charlotte Observer*?
[*50] A No. In Charlotte we used--*The Charlotte Post* was the newspaper that we used in Charlotte.
Q I think I know what *The Charlotte Post* is, but maybe you can fill that in for the record.
A It is primarily an African American newspaper.
Q How about in Greensboro? Did you have any newspaper you used there?
A In '98 Greensboro was not a part of---
Q (interposing) Oh, I'm sorry. How about in '94 in Greensboro? Was there any newspaper that you used predominantly then?
A I am pretty sure, to the best of my knowledge, we did advertise in *The Greensboro Chronicle*.
Q *The Greensboro Chronicle*; is that like *The Charlotte Post* basically?
A Yes.
Q Is there a similar publication in Winston-Salem?
A Yes.
Q And what is that, if I may ask?
A *The Chronicle*, I believe. I don't know. I cannot remember the name of the newspaper in Winston-Salem. But there is a similar African American newspaper in---

Q (interposing) And did you focus most of your advertising in that publication under those circumstances?
A Most of it, yes.

* * *

[*58] Q The '97 plan, would you say that was compact, geographically compact?
A Yes.
Q Is that even more compact than the '92 plan?
A To me; no.
Q It is less compact to you?
A To me.

* * *

[*58] Q Would you say that the '98 plan is more compact or less compact than the '97 plan?
[*59] A In my eyes?
Q Yes, sure.
A In my eyes I would say it is less.

* * *

[*67] Q Would you have any preference between Democratic precincts that were substantially composed of--or [*68] predominantly composed of African Americans or other Democratic precincts that were not predominantly composed of African Americans?

A My preference would be have highly Democratic performing precincts both in terms of how they vote and in terms of the number of votes.
Q Are there any more highly performing Democratic precincts in North Carolina that you are aware of than those that are predominantly African American?
A Most of the highest Democratic performing precincts are African Americans. I have a--there are precincts that produces more numbers for a candidate that are not as favored in terms of African Americans.

* * *

[*69] Q Are there any particular groups that try to rally behind you in organizing a campaign for--and you have represented a number of--well, let me put it this way. You have been a manager not only for African American candidates, but also for some white candidates, I believe you said. Was there any difference in the tactics that you used in the two situations?
A Difference in terms of tactics; campaigns are pretty much boilerplate things, I think. I think that you figure out what voters that you want to go ahead and target in and then you work to bring those voters home.
Q Was there a difference in the targeted voters with respect to the African American candidate?
A Not really; interestingly enough, not really. We have worked for many affiliated organizations. We have worked for women, senior citizens, African American, the Hispanic community. In the campaigns that I have been involved with

that is kind of the target groups that we were working towards, keeping them involved.

* * *

[*77] Q I may have asked you this earlier, but with your direct mail how do you select your targets?

A For direct mail that is in the campaign office or in the congressional office?

[*78] Q Well, let's say in the campaign office and then you can tell us to what extent the congressional office uses direct mail.

A Direct mail in the '98 campaign? Is that what we are talking about right now?

Q In the what?

A In the 1998 campaign?

Q That will be fine.

A We did polling to see exactly what the issues were that was on people's minds. We in turn developed mail towards target groups. Seniors was one of the target groups that we sent direct mail to. Women was a targeted direct mail. African Americans was a targeted direct mail. And we sent smaller mailers to other individual groups, organizations.

Q With respect to African Americans that you target, how do you get the information as to whether a person is African American or in some other category?

A In North Carolina that is part of their voting history. They have demographics on the voter profile in North Carolina so you can select whether you want white, male, or African American.

* * *

[*82] Q Are there some that you target with respect to race in your direct mailing without regard to party?

A I am not sure. Can you restate that one more time, please?

Q Do you have some direct mailouts--and I am not talking about five or ten; I am talking about sending several hundred---

A (interposing) Right.

Q ---where you are selecting those who the voter registration data identifies as being African American?

Mr. Cox: Object as to form.

A Do we send out direct mail to African Americans?

Q Right.

A Yes.

Q Selected as such?

Mr. Cox: Object as to form; answer if you can.

Q Let me try to clarify it--where you not sending it to [*83] whites; you are sending it only to African Americans?

A We have sent mail out that has been directly to the African American community, yes.

Q And in those instances the source of the list were the voting registration?

A The source of the list came from the voter registration, but we use a vendor that we request those voters to come from, yes.

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[*31] A Yes.

Q Now, let's talk about how that works. You have a map showing--it could be census blocks?

A Yes, sir.

Q It could be precincts?

A Yes, sir.

Q It could be counties?

A Yes.

Q A combination thereof?

A Yes.

Q And as you look at that, what statistics are displayed in the regular course of things? Are there any standard statistics that are displayed?

A The default in the system is to display the name of the unit on the screen, the name of the precinct, the number of the census block, the name of the county. And also there is maintained--although the window is small so you can't see all the statistics, there is a--the district that you are at that point assigning units to or removing units from, there is a long table, all of which isn't seen unless you scroll down, showing about 30 different components of that district at that point in time.

Q Can you recall what--recall as many of those components as you--as you do recall?

A Total population broken down by race, voting age [*32] population broken down by race, voter registration broken down by party and broken down by race, and election returns from three different elections. I believe that was the total list of items that you could scroll through.

Q So as you displayed that, you would have all of that information there before your eyes; is that correct?

A Well, you could, but it depends on whether you make--put that window on top. With the Windows technology, some of the windows are going to be on top and some of them on the bottom, so it all depends. Normally I didn't have that whole window open all the time because it made--you couldn't read half the map then.

Q If you had it only partly open, would the population data be there?

A Yes. That was at the top--the top of the scroll bar was total population.

Q And how about the racial data?

A That came next below it on that scroll bar. The beginning of the scroll bar was data gotten from the Census Bureau, and at the bottom of the scroll bar was data that we added to that system.

Q And that was what data that you added?

A Voter registration and election returns.

Q So the top part--you would have to scroll down in order to get that other data?

[*33] A Either that or put the window on top and expand it to show the whole window. There were two different ways to do it.

Q And if you did the latter, then it was very difficult to read, I believe you testified?

A Well, you could read that very well, but it suppressed about a third of the map so it was hard to see the map at that point.

Q I see. So was it your typical practice to use--to scroll down when you wanted all the information rather than to use the larger---

A (interposing) Well, if I wanted all the information, then I would leave the whole window open, but normally I would be looking at perhaps one or maybe two of the different components depending on what year I was at and for what purpose I was doing it.

Q And what were the components you would typically be looking at, or was there any typical data?

A Typically the main--the three things that were looked at were election returns, total population, and voting age population. I rarely looked at the voter registration information.

Q Did you look at the race?

A Yes.

Q Was that one of the things you regularly looked at?

[*34] A I think it really depended on which year and which--on which plan as to what I regularly looked at.

Q Can you describe that with respect to years and plans?

Ms. Smiley: I'm sorry. I am going to object. That is compound question. You are going to have to direct him--

Q (interposing) All right. Describe it with respect to years.

Ms. Smiley: You are going have to--that is still a compound question. You are going to have to direct him to a particular plan.

Q Can you clarify your--you said which year and which plan. What did you mean by that?

A Well, in the 1991 plan, which is the one that was rejected by the Justice Department, I believe that I looked at total voting age population and election returns. I believe that was true in '92 also.

In the 1997 plan in doing the 12th Congressional District, I looked almost exclusively at total population and election returns, in the 1st Congressional District at the total population, racial breakdowns, and election returns, not necessarily in that order.

In the 1998 plan--I am having trouble jumping around--

Q (interposing) Sure.

[*35] A ---because I have done the '98 plan most recently, so sometimes it is difficult for me to sort out in my memory the '98 from the '97, since much of this litigation is about not the latest thing I did. The '98 plan--I don't know which district we did, 12th--predominantly at the election returns in the 1998 plan.

Q And---

A (interposing) But all the various factors were looked at at one time or another, probably about every district to try to--we came down to the bottom line to see what the totals were on everything.

Q And with--you have indicated, I believe, in your last answer that with respect to the '97 plan, you looked at race as to the 1st District?

A Well, I also said that eventually I looked at everything. But in the 1997 plan, I looked at race to a greater extent in the 1st District than in the 12th District.

Q And why was that?

A Well, because the demographics were different in the east and the piedmont in terms of creating a district; the--there were just different areas of the state and different goals, different results, different voting patterns in different parts of the state. Issues like racial bloc voting, et cetera were different in different parts of the state, so my analyses were different depending on what I felt **[*36]** the important legal issues were to satisfy.

Q When you speak of racial bloc voting, are you referring to racial bloc voting by blacks and whites or by whites alone or by blacks alone?

A By both.

Q Okay. Well, let me ask you this. Isn't it true that in North Carolina 95 percent of the African Americans who register register as Democrats?

A I did some research in 1992 looking at the 30 or so counties that had their voter registration at that time cross-tabulated by party and race. And I found--and I think this was in our 1992 submission to the Justice Department--that in urban counties that had substantial minority populations that 95 percent of the blacks were registered Democrats, and in the rural counties with a substantial black population it was about 97 or 98 percent.

Q And was it also your belief that the African Americans voted cohesively in the same manner as they registered?

A Yes.

* * *

[*116] Q What does it mean? What do you understand functional compactness to mean?

A Well, I think the traditional means of measuring compactness have been the social science ones. I think we mentioned four or five. You mentioned two specific ones and I can't remember the names, P and N.

Q Dispersion compactness, perimeter---

A (interposing) Pildes--I can't remember the names of the scientists. But basically there are four or five different widely used factors that are basically purely mathematical based on compactness. But they don't really deal with any issues of demography, history, or other types of social sciences other than the application of a mathematical model.

I think functional compactness is compactness, not just the mathematics but looking at population, looking at where the population is, where it came from, looking at history, looking at settlements. In North Carolina you look at pattern of plantations and slavery, and there is a whole bunch of different factors that are not mathematical. So I think functional compactness is the nonmathematical component of compactness, larger word.

Q Is that the way you use compactness, sort of in line what you have explained as functional compactness?

A I think functional compactness would really be the [*117] nonmathematical parts of the word.

* * *

[*119] Q By the way, with respect to the functional compactness, is there any--how do you measure it? What are the measurements?

A Well, I don't know of any measure that you could do with a calculator of that. I think it is a component looking at issues of history, past history, whether it is history of the area, history of settlement patterns or racial segregation, history of transportation or history of past redistricting.

Again, I go back again to the Black Second, which you had raised first, as an issue where a district running from Vance to Jones County, basically all three configurations are basically Vance to Jones with a number of variants that--I [*120] don't know what that district would come up with in the mathematical formulas, but I think it was widely viewed as one that was fair and put together a compact population of those with like interests in the northeastern part of the state for 30 years.

* * *

[*121] Q Well, how do you--I am just trying to tie down how do you determine whether something is functionally compact.

A The totality of the circumstances.

* * *

Q Well, you mentioned history and the history of the Black Second. Isn't it also relevant that for two centuries the

legislature never combined Mecklenburg County with either Guilford or Forsyth County?

Ms. Smiley: Object to the form of the question; if you can answer that--relevant to whom?

[*122] Q Relative to functional compactness.

A Well, remember in the three plans prior to 1792 they were combined. So I mean, I think that is relevant also, but I think certainly that would be a factor deciding the totality of the circumstances. Yes.

Q And as to the totality of the circumstances, wouldn't it also be a factor in that Mecklenburg County is in one metropolitan statistical area and that Guilford and Forsyth are in a different one?

A Well, I think--the current term, I think, is metropolitan statistical area. I think they dropped the word "standard"---

Q (interposing) Yeah.

A ---but the---

Q (interposing) I am old fashioned.

A That is okay. It is hard to remember the changes in terminology. That is a census department test that usually deals with a central city or urban area and its urban suburbs, and I am not sure how exactly they define these, but Charlotte and I think it is--I think it includes two counties in South Carolina which are not and have never been congressionally redistricted together with Mecklenburg County.

Q Quite true. But still given the circumstance that the Census Bureau uses this terminology, isn't it significant in **[*123]** determining functional compactness that Charlotte is

in one MSA, if I may use that abbreviation, and Guilford--I mean and Greensboro and Winston are in a different MSA?

Ms. Smiley: I will object to the form of the question. You are attempting to without identifying what is significant to put words into Mr. Cohen's mouth. If you can answer the question, Mr. Cohen, go ahead.

A I certainly think it has some significance.

* * *

[*123] Q Are you familiar with circulation areas, newspaper circulation areas, that term?

A It is the area where they deliver their paper.

Q Yeah; okay. Would you think it significant in determining functional compactness that there is nobody in Mecklenburg County who subscribes to the Winston-Salem newspaper?

A I bet there is a bunch of students at UNC Charlotte who are from Forsyth County that subscribe to it.

Q Have you looked at--do you mean subscribe to it in Forsyth County?

A I know that when I was in college most college students subscribed to their hometown paper if they were **[*124]** away. But if you are talking about--you know, so I am sure that there are some subscriptions in Charlotte to *The Winston-Salem Journal*. It is probably largely students at school in Charlotte plus libraries.

Q And you would think there was some subscription to the Greensboro newspaper by the same token?

A Yeah. I mean, you asked if there are some.

Q Yeah.

A Maybe, you know, a couple of hundred.

Q Have you by any chance looked at the table provided by one of the defendants' experts--I forget which one--that had the circulation and as I recall indicated zero, zero for the Winston-Salem and Greensboro papers down in Charlotte?

A I have not, though I don't believe it zero. I think they may be confusing mail circulation with carrier delivery. I don't think it is zero mail delivery.

Q Well, certainly wouldn't it be relevant to functional compactness how much the newspapers of one community are read in other communities in the same district?

A I am sure that that would have some relevance to all the factors; yes.

Q And if I told you that DMA is a television term referring basically to market area, wouldn't it be significant that the DMA, the market area, for the Charlotte TV stations is different from the market area for the [*125] stations in the Triad, namely Greensboro, High Point and Winston-Salem?

Ms. Smiley: Object to the form of the question and characterization of significant. If you can answer the question, go ahead.

A I am sure that they are different.

Q They are different. I can assure you of that, too. But isn't that relevant to functional compactness or lack of functional compactness?

A Well, I think that also that one of the things that this--when you are looking, for instance, at the minority population, there is also a number of newspapers in circulation in the

minority community that are not based on the community where they live.

I know there is--I think there is one or two newspapers in the black community that circulate over the entire state, so I am not sure whether--I don't believe that any one sole source of information on television is network television anymore, nor do I believe that everyone's sole source of newspaper information is simply the daily newspaper anymore. I think that things are changing and have changed substantially.

Q And with respect to television, there is change to cable, a lot of use of cable; correct?

A Yeah. I mean, I think things are fragmenting rapidly.

[*126] Q Yeah, but they are fragmenting around particular geographic areas; isn't that true?

A Smaller and smaller areas.

Q And isn't it true that the cable access channel on a cable system in Charlotte would have nothing from Winston-Salem or Greensboro?

A It would certainly be very unlikely, although I know they invite people in to produce stuff and will carry stuff from other systems, so I don't really know the specific content of the public access channel in Charlotte.

Q Now, with respect to functional compactness, you referred to newspapers published by African Americans and designed for African American readership predominantly; is that correct? You made some reference to that a moment or two ago?

A Yes.

Q What is the relationship between race and functional compactness?

A I think that the significance comes under Section 2 and Section 5 in the *Gingles* case, where if you look at is there a compact--is the minority community compact. So I think it becomes relevant to look at the minority community as opposed to the entire community because I think that is one of the tests of *Gingles*. *Gingles* doesn't ask whether the district is compact. It asks whether the minority population **[*127]** is compact, so I think that becomes relevant then. Yes, sir.

Q It asks whether it is geographically compact, doesn't it?

A Yes.

Q Now, is the fact that a person lives--a black person lives in Charlotte significant in determining the functional compactness of that black person with an African American who lives in Greensboro?

A I believe that there was some expert testimony submitted in the 1992 trial that in fact the settlement patters in the urban area post-slavery were that the settlement patterns from Greensboro to Charlotte were largely determined by railroad structure and industrialization along the line with people moving from one city to another still within racially segregated communities and in fact historically there were links given manufacturing, transportation, and dispersion of slave populations that linked together those communities in the piedmont crescent.

Q All right; but now let's look at center city Charlotte, then, with that in mind. You have a white citizen who lives in one part of central city Charlotte and you have an African American who lives ten blocks away.

A Uh-huh.

Q Does race have anything to do with their functional compactness?

[*128] A Well, I think historically it is more likely that the ancestors of the black--of that black citizen came via the North Carolina Railroad. Perhaps their ancestors lived in Greensboro or Thomasville or whatever after coming off a plantation as opposed to the white person probably coming from New York. So I think, yes, there is a substantial distinction historically.

Q So historically, but you say that relates to functional compactness---

A (interposing) Yes.

Q ---as of the present time?

A Yes.

Q And therefore if the white is put in one district and the black is put in another, that makes sense because they are not functionally compact; is that---

A (interposing) I wouldn't say it makes--necessarily makes sense. I said that in fact that the issue of compactness in the population is that there may be more commonality of interest between a black person in Charlotte and one in--and one in Greensboro and one in Winston-Salem or one in Greensboro and Charlotte in terms of family ties than there may be between two white persons, one of whom came from New York and the other came from Ohio.

Q And with respect to Charlotte, staying in Charlotte, isn't it true that Sue Myrick, who is a member of Congress **[*129]** from one district, lives only a few doors away from Melvin Watt, who is a congressman from another one?

A Yes; I believe they live in the same census block, in fact.

Q Same census block?

A Yes.

Q And census block is fairly limited; is that correct?

A It would in the context of Charlotte normally be a city block.

Q But in the--there are in the same block, though, basically?

A Yes.

Q How functionally compact are they?

A Well, Ms. Myrick decided to run in a congressional district that she didn't live in. I mean, that was her decision. I am not sure if that has anything to do with--the U. S. Constitution doesn't require you to live within your congressional district in order to run, so I am not sure of the relevance of Ms. Myrick and compactness when she chose to live in a district she didn't run in, or I think I said that backwards.

Q I am asking in the context of race as it relates to functional compactness are Sue Myrick and Melvin Watt functionally compact because they live in the same district or does geography have anything to do with it?

[*130] A Well, I think they probably are unusual in that--in much of North Carolina that they live in an integrated census block, which is not probably the norm in North Carolina.

Q And in drawing the 1992 plan, isn't it true that you went block by block and had blocks that were heavily African American put in with the 12th District and the 1st District and

nearby blocks, census blocks, which were predominantly white which you put in either the 1st or the 12th in---

A (interposing) Which year's plan were you asking about?

Q 1992.

A Well, we started in 1992 with using precincts, not census blocks, as I already testified. But in the 1992 plan, yes, in that plan there was a lot of--when it got down to the very bottom level of assignments being made looking at the race predominantly. Yes.

* * *

[*145] Q All right. Are you aware of any statement by anyone at the--did you have any conversation with anybody in the Civil Rights Division?

A In 1996, I don't think so.

Q How about in 1997?

A Yes.

Q What, if anything, did they--and during what periods of time did those--well, how many communications did you have and over what period of time?

A I would have had discussions with people in the Justice Department during the time of putting together the Section 5 submittal in 1997 and during their review process. I don't remember what months they were in '97.

Q Did you have any discussions with them at the time that you were actually preparing the plan?

A No.

Q Did you in any way seek to ask them whether they would approve anything less than a majority black district in the northeastern part of North Carolina?

A They don't give advisory opinions.

Q So---

A (interposing) The answer is no, I did not.

Q So you had to rely on whatever information you had apart from any advisory opinion on their part?

[*146] A Yes.

Q And then when you prepared the Section 5 submission, did you direct that towards assuring that they would recognize that the 1st District was majority black and would thereby be inclined to approve it?

A My duties in putting together a Section 5 submittal was essentially to be an advocate for the State in helping show that the plan met the requirements of Section 5, so I would have assisted or put together arguments designed to show that it met Section 5 based on what we thought the Justice Department thought it meant.

Q And in doing that, did you proceed on the assumption that the Justice Department thought that it meant that there had to be a majority black district in northeastern North Carolina?

A I felt that Section 5 would require it so that was what--and Section 2 in the *Gingles* case, so that was basically what we were putting forward. I don't remember exactly what I said or what the language of the submission was.

Q So that was your belief from 1996 right on through to the time you submitted the Section 5 preclearance documents in the spring---

A (interposing) Yes, sir.

* * *

[*151] Mr. Everett: I would like for him to explain why he views the--I believe he did indicate he viewed the 12th District in the 1997 plan as being more compact, not geographically compact, but compact functionally---

The Witness: (interposing) There is not just one---

Mr. Everett: ---than the earlier one.

The Witness: There is not just one compact 12th District that you can create. I think that just as there is functional compactness between urban populations in Guilford County with those in Mecklenburg County, there is also some functional compactness between people in one part of Davidson and another and one part of Rowan and another. It is a balancing test and there are many different options the legislature can choose from that are constitutional. The legislature chooses which ones it wants to go down.

So I think that both--both the areas in Davidson relate to each other, Rowan, relate to functional compactness just like Guilford versus Mecklenburg, so I think the answer is both to your question, not exclusively one or the other.

Q So you could do it either way but one winds up with what, 47 percent black and the other around 40 percent?

A Yes, sir.

Q Now, are you aware why the choice was made to be 47 **[*152]** percent black instead of 40 percent?

Ms. Smiley: Object to the form of the question. If you can answer that--I think you are assuming facts not in evidence.

A I think the choice is whether to create a district that a Democrat was capable to be elected in because the key issue here in creating the district in 1997 was really to create a district--an urban district in the Piedmont where a Democrat could best be elected and also the same thing as reelecting the incumbent.

And I think the issue was Greensboro being in the district as compared with more rural areas of Davidson or Rowan County that the result was more--was a more Democratic district. So I think the cause and effect is the district is more Democratic and it is also more black, not the other way around, that there was not any goal to have 47 percent and then the boundaries of the district followed that.

Q Now, with respect to the 19--well, with respect to the Exhibit 1 plan and the plan that was adopted in 1998---

A (interposing) Yes, sir.

Q Isn't there a similarity in that Guilford County was not in either one of those?

A Yes, that is similar.

Q And in that one--didn't you testified earlier that Congressman Watt won in the general election?

[*153] A Yes, he did.

Q And he won--you are not--you are not aware of what majority he won by, but he did win?

A I remember it was a smaller majority in 1998 than it was in 1996. That is my recollection.

Q Yeah. And wouldn't you have expected a smaller majority if there were a reduction of the African American population from the mid 50s to the--to 47 percent?

A I expected a reduction because the number of Democratic voters was far less.

Q And also--well, let me put it this way. Couldn't you state it just as readily by saying you expected because the number of blacks was far less?

A Well, you asked me earlier wasn't it true that 95 percent of the blacks were registered and voted Democratic. I answered that yes. And I think that the analysis of Democratic vote and black population are very close to being the same questions and answers.

Q So you could word it either way; right?

A It could be worded the same way, but my answer was the intent was to deal with the Democratic, not the race.

* * *

[*158] Q Is it your understanding that under *Shaw v. Reno* and the later cases race has to be a predominant motive as a basis for any sort of strict scrutiny?

A That is my understanding of the cases.

Q If race isn't a predominant motive, then *Shaw v. Reno* doesn't apply?

A I don't believe it applies.

Q Now, let me ask you this. With respect to the 1992 plan, if the North Carolina General Assembly had simply reenacted it and said, "We are doing"--"We are doing this for political reasons and not for race; race is not the predominant motive," would it be your interpretation then that *Shaw v. Reno* would not apply?

Ms. Smiley: Object to the form of the question; if you can answer that.

A You mean that *Shaw v. Reno* wouldn't apply because we said it wasn't the predominant factor?

Q No.

A I mean I think it is a question for the court to decide.

Q Okay.

A I don't think just because we say something means it is so.

[*159] Q And if the court believed that you were doing it now for a political reason, *Shaw v. Reno* wouldn't apply?

A Well, the case would apply, but the holding of the case would not require it to be held unconstitutional if the court felt that politics was the predominant factor.

Q So would it true that in any situation where it is stated by the legislature that politics is the predominant motive and if the court believes that, then no matter what the racial configuration is there should be--there should be no application of *Shaw v. Reno*?

A I don't know if I really analyzed the case to that extent to answer your question, so I don't know.

Q Well, do you see any reason why that wouldn't yield an affirmative answer just thinking about it?

Ms. Smiley: I am going to object to the form of the question.

A Could you ask it again, please?

Q Okay. My question is--and I realize you haven't had an attempt--haven't had a long chance to analyze it, but wouldn't it be true that if the legislature says that political motivation is predominant and if a court agreed, accepted that, that then no

matter what the racial pattern or configuration was, there would be no basis for applying *Shaw v. Reno*?

Ms. Smiley: Object to the form of the question. [*160] Answer if you can.

A From what I know of reading the majority opinions in the *Shaw* cases, the answer would be that it would not apply.

Q Now---

A (interposing) I didn't want to get it backwards.

Q And given that circumstance and given that in North Carolina 95 percent of the African Americans are--or at least 95 percent are registered to vote as Democrat, doesn't that mean that if the legislature says "We moved 300,000 African Americans into this district because they were Democrats" that then *Shaw v. Reno* would not apply?

Ms. Smiley: Object to the form of the question. Answer if you can.

A I don't think it necessarily is just because we said it is.

Q Well, let's say if they believed it.

A Yes.

Q So doesn't that mean that if the legislative leaders can put their legislators in a frame of mind to say and believe that "We are doing this for politics," there is no basis for applying *Shaw v. Reno*?

Ms. Smiley: Object to the form of the question. You can answer if you can.

A If race is not the predominant factor--whatever predominant means, if it is not the predominant factor, then [*161] I don't think *Shaw* applies. If politics is the sole factor, then race is certainly not the predominant factor.

Q So that if the--if you have a situation where you--which you have in North Carolina, where there is almost an identity between--well, let me put it this way--where almost every African American who registers to vote and votes--registers to vote and votes as a Democrat, doesn't this mean that by simply referring to them as Democrats you have eliminated the effect of *Shaw v. Reno*?

Ms. Smiley: Object to the form of the question. I believe the *Bush v. Vera* answered that question. Gerry, if you want to try and respond.

A I think I have already testified today that the genesis of--and this relates to your question--the genesis of going to this configuration of the 12th District rather than the 1991 plan came from a political understanding of Mr. Balmer's plans to the Justice Department that creating a district--a predominantly Democratic district in the urban piedmont would add a Democratic seat as opposed to a Republican one, and that was the genesis for that decision, not race at all.

Q So that actually the 1st District in the--I mean, pardon me, the 12th District in the 1992 plan was politically motivated predominantly rather than racially?

A I think it was--I think it was predominantly [*162] politically motivated.

Q And therefore the district should not have been held unconstitutional; is that correct?

A Well, the court didn't--obviously the court did not feel that that was the case, that politics was predominant.

Q But if they had thought that it was predominant, even though it yielded the configuration that it did, they should have allowed the district to be--to continue---

Ms. Smiley: (interposing) Object to the form of the question.

Q ---as it exists in the 1992 plan?

A If the holding of--I think the holding had to do with the shape triggering the analysis and then belying the allegations of motive. The court gave it special scrutiny and then did not believe the state's case in point.

* * *

[*167] Q Now, in the 1997 plan the 12th District has less than majority black, if I recall; is that correct?

A Yes.

Q Was it your opinion at the time, and I hope I am not [*168] repeating the question, that because of that circumstance *Shaw v. Reno* did not apply?

A Well, I think all cases always apply to---

Q (interposing) I'm sorry?

A I think the case of *Shaw v. Reno* certainly applies, but I am not sure what your question is.

Q Okay. My question is whether a less than majority minority district is subject to any sort of strict scrutiny.

A I have never really had any opinion on that question.

Q Then let me ask you this. In connection with the 12th District as it exists there, if a court should find a predominantly racial motive for drawing that district, do you believe it would then be able to meet strict scrutiny?

Ms. Smiley: Object to the form of the question. Answer if you can.

Q Do you have any opinion on that?

A If the court found that race was a predominant reason with strict scrutiny; well, it is hard for me to answer since my contention is that politics was the most predominant factor. So if race was the most predominant factor, and if the court--if the court found that race was the most predominant factor and that *Shaw* applies even if the district is not majority black, then it is my opinion that the strict scrutiny rule would have to be applied.

Q All right.

[*169] A And then I need to figure out whether--then the answer--now I think I phrased the question.

Q All right.

A The question you have now asked me is based on all of that---

Q All right. Based on all that, do you think it would meet the test of strict scrutiny?

Ms. Smiley: Object to the form of the question. Answer if you can.

A I don't have any opinion on that.

Q Well, politics would certainly not be a compelling government interest as you understand it, would it?

A Sure I think politics is a compelling government interest.

Q So you do think it would be a compelling government interest--politics?

A Yes.

Q How about incumbent protection? Would that be a compelling government interest?

A Okay; the question is compelling. I think to meet the compelling test, you have to look at all the factors together to

determine whether you have met this compelling test. I am not sure--it depends on what the--it depends on how important the factors were in a particular case by case basis. I don't think in the abstract you know whether the court is going to **[*170]** find something compelling unless you know--you know, were there two incumbents that live in the same area, were there--you know, were you are trying to keep the same state's division of members in Congress based on the politics. I think it would depend on what the facts were.

Q So you think that that type of wording keeping incumbents in the same--having them in the same district would constitute or could constitute a compelling government interest?

A Along with other factors, it could meet--help meet that test. I don't know if on its own--if that was the only factor I think it probably would not be a compelling state interest, but I think it would be relevant in determining the whole set of factors and would be important.

Q Can you give us some other factors that might be dialed into the equation?

Ms. Smiley: Object to the form of the question.

Q Or that might be considered; I will rephrase it.

Ms. Smiley: I still object to the form of the question.

A Partisan balance, preserving the core of existing districts, putting members together, complying with Section 2 if the *Gingles* factors are met; I think there is--those are all things that could be considered. I think I mentioned incumbents.

[*171] Q Okay. Complying with the *Gingles* factors, would that have any relevance to the creation of this 12th District in the 1997 plan?

Ms. Smiley: Object to the form of the question. You may answer if you can.

A I don't know. I don't have any opinion on that.

Q You don't have an opinion one way or another? Okay. You referred to something about a core?

A Yes.

Q What do you mean by that reference?

A If you have an existing district, then one governmental interest I think is allowing a new district to resemble to some extent the prior one.

Q When the 1991 plan was drawn, did the legislature make any effort to retain the core of the districts from the 1990 plan---

A (interposing) Yes.

Q ---or 1980 plan I should say.

A Yes.

Q And in drawing the 1992 plan, was there an effort made to retain the core of the 1991 plan?

Ms. Smiley: Objection. He has already answered that question.

A I have already answered that we completely changed the configuration of the 12th and basically started afresh so [*172] that--there was no core of an existing 12th District because we didn't have 12 districts for 30 years before that, so it is really had to answer that question in a meaningful way; the remaining 11 districts, yes.

Q Now, with respect to the 1997 12th District in comparison with the 1992 12th District, was there an effort to maintain a core?

A Yes.

Q And can you describe how that effort was carried out?

A Well, as we looked at the previous 12th District and at the *Shaw* decisions in validating that district, that in continuing to try to construct a district that was--would elect a Democratic member of Congress we looked at the precincts first that had been in the 12th District that had been invalidated because most of them were overwhelmingly Democratic.

And in putting together the 12th District, we looked at the election returns of all those precincts as our predominant factor in constructing the 12th, so in that--the core of the district was kept because it was a district that had elected a Democratic congressman in 1992. Ergo, some of those factors were already there.

Q Elected an African American as an incumbent; correct?

A Yes.

Q And wasn't a substantial amount of the vote for that [*173] African American given by persons who were African Americans?

Ms. Smiley: Object to the form of the question. You can answer if you can to the characterization "substantial."

A A substantial amount of the votes that Harvey Gantt received, were they from blacks? I have never analyzed it in that context whether looking at whether--I have never looked to see whether a majority of the votes that Gantt got--excuse me, that Watt got were from blacks, so I wouldn't have any

opinion of that. It would probably be an easy thing to figure out, but I have never looked at that.

Q So you do not deny that a substantial--we will put it this way. Would it be your belief that a substantial number of the votes that he received was from African Americans?

A Yes.

Ms. Smiley: Object to the form of the question.

Q Now, did you consider Charlotte as a hub for drawing the 12th District after the--in the 1997 plan after the invalidating of the 12th District in the earlier plan?

A Yes.

Q So Charlotte was a sort of beginning point; correct?

A Yes.

Q In connection with the--in connection with the old 12th District that was invalidated, who and when was the decision made to take Durham out of it?

[*174] A Did you say who and when?

Q Yeah. Who made it? I'm sorry. That is a very poorly phrased question. When was it made--when was the decision made and by whom to take Durham out of the 12th District?

A Well, I worked as committee counsel and my primary responsibility in our management structure is to report to the chairman of the committee, who was Senator Roy Cooper. And I am sure that one of my first instructions was to remove Durham from the district to meet the constitutional infirmity. Since Mecklenburg was to be the hub, that had to be the conclusion.

Q And how about Gastonia, which is fairly close to Mecklenburg? How about the decision to take that out, when made and by whom?

A I think the same context looking at the appearance issue since the court had focused on that--that an appearance could trigger something--that removing Gaston County removed something that--I think from a reading of the court that that was another thing that was felt to be objectionable in trying to meet Justice O'Connor's concerns.

Q In the goals that are stated when this process began wasn't it stated there would be an effort to avoid splitting of counties?

A I don't remember.

Q Okay. Well, let me ask this, then. Did you consider [*175] in drawing the 1997 plan which was enacted that all of the counties of the proposed 12th District would be split?

A I think that--yes, that we certainly looked at the issue of that, but then felt that by dividing counties a district that was more Democrat could be created since the---

Q (interposing) And by dividing--I'm sorry.

Ms. Smiley: Please let him finish his question.

A ---since the areas that were not included in those counties were predominantly Republican.

Q And were also predominantly white?

A That is also the case. Yes.

Q Do you recall in any instances areas being excluded which were in fact predominantly Democratic?

A What appeared on my screen while I was doing the redistricting for each precinct was--election returns is what I would have had on my screen. In some cases, we might have taken a precinct that was slightly less Democratic as opposed to more because the district had to be contiguous and it also had to have the right population.

Sometimes you would want to do "A" but the population didn't work, so you had to switch out a precinct to make the population tolerance fall within it, and I might have probably wound up taking something that was slightly less desirable from the partisan viewpoint in order to meet the population criteria since we had so many different criteria [*176] to juggle.

Q Now, in this process of getting the voting results, were the voting results something that you scrolled up? I believe you indicated certain voting results were near the bottom and you could scroll them up?

A Well, you could do that. Actually, I answered an earlier question that the default on the screen was to show the name of the unit. You could also choose to put something else, so that while the default might have been to say Charlotte Number 1, in fact when I was doing this what I showed on the screen instead of the name of the precinct was one or several of the election returns with that precinct rather than the name of the precinct, so it was there right in front of me. It was also up in the corner there with that other map with the other window.

Q Were you aware at the time that some of the precincts that had the heaviest Democratic voting results were African American---

A (interposing) Yes.

* * *

[*186] Q Do you know whether there was a much higher percentage of African Americans who were retained in the

12th District as between the 1992 and the 1997 than the percentage of whites?

A I do not know the answer to that question.

Q Do you know conversely whether of those who were moved into the 19--into the 12th District from other districts as shown in the '92 plan whether the number of whites that was moved in from other districts was greater than the number of African Americans moved in?

A Well, since the district dropped from 54 to 47 percent black, the answer would have to be yes.

Q Pardon me?

A Without knowing anything else, since the district dropped from 54 to 47---

Q (interposing) You don't know to what extent the formation of the district involved movement of whites as compared with blacks to get that number?

A I would accept that since the percentage of blacks dropped by 7 percent, then more whites must have been moved in than blacks.

[*187] Q But isn't it true the blacks who were there were the ones who had already been there for the most part?

* * *

[*187] A Well, I don't know because since all of Greensboro--I'm sorry--Orange, Durham, Alamance, Gaston were dropped out. I wouldn't think that it is most, but I have never done any statistics to know what the percentage is.

[*188] Q Do you have any idea to what extent whites who had been in the earlier district--that is, the 1992 version of the

12th District--were still in the 1997 version of the 12th District?

A Well, obviously those in Alamance, Orange, Durham, eastern Guilford, and Gaston were obviously no longer there.

Q And where did they--where did they make up the difference in that regard?

A Mecklenburg County. More of--when the eastern and western ends of the district were eliminated, the remaining district had more population in each of the remaining six counties than in the prior one, although it is possible that in Iredell County it was the same configuration of precincts. I am not sure. But the other counties all had more population in the 1997 12th District than they did in 1992.

* * *

[*194] Q Now, with respect to the formation of this district, the one that ultimately was--redrawing this district, the one that ultimately was enacted into law, can you explain your role in the drawing of that district?

[*195] A Yes.

Q And what was that role?

A To create a district that would elect a Democrat that had the proper population.

Q That had what?

A That had the proper population, that one-twelfth of the state's population, that would elect a Democrat, that included the residence of Congressman Watt, and that took the most Democratic precincts in order to do that.

* * *

[*195] Q Have you heard the term "racial fairness" anywhere along the line in your work on these---

A (interposing) I have heard that word at some point; I am not sure in the context of this district or this plan.

Q Do you have any idea what that term might mean?

A Well, it could be a euphemism for proportionality. It could be a euphemism for one of any number of factors; giving an opportunity for candidates to elect--voters to elect a candidate of their choice, which would be a requirement of the Voting Rights Act.

Q When you say euphemism for proportionality, can you explain what you mean by that?

[*196] A You went back to talk to Mr. Dunn's comments in 1991, for instance, where I think he was using those as synonymous terms.

* * *

[*201] Q ---about the 12th. At the bottom of the 12th District right near the South Carolina line, is there an area that is in a different district, I believe in the 9th district?

[*202] A If you are talking about part of Precinct 77, Charlotte Precinct 77 is divided between the 12th and 9th, I believe.

Q And had it not been divided in that manner, as shown on the map of the district--I mean, the map of the redistricting plan--the 9th district would not have been contiguous; is that true?

A Assuming the rest of the 12th was the same way it was, yes; that is correct.

Q And so this provided a bridge between the two, the east and the west parts of the 9th District?

A That is correct.

Q The 77th--Precinct 77 was primarily African American, wasn't it?

A Yes.

Q And indeed isn't it true the portion that is in the 9th District--the portion of Precinct 77 in the 9th District had either one person or no persons at the time?

A It had one person in the 1991 census, but she has since died and there is actually nobody there now. It is the Westinghouse Industrial Park.

* * *

[*205] Q All right. Now, in a floor debate, and I believe this is Senator Cooper speaking, he speaks--he says, "We have preserved the current partisan nature of each of the districts." Does that mean, then, that in drawing the 12th District that it was intended to retain the partisan nature of the 12th District in the 1992 plan, i.e., '97 and '92 were both designed to have the same partisan nature?

A Yes.

Q Is that what he is referring to?

A Yes.

Q And he also says that the Senate plan, which was the precursor to the eventually adopted 1997 plan--here is his passage--"uses as a foundation the basic core of the existing

congressional districts. No district is dramatically changed, and most of the districts, if not all of the districts, have become more compact." Is that a correct statement in your view?

Ms. Smiley: Object to the form of the question. You can answer that if you can.

A Certainly from a mathematical basis they are all substantially more compact. That was the first part of that question? I'm sorry. I wasn't listening to the second part.

Q The first part says the Senate plan ultimately adopted as a practical---

A (interposing) No radical change.

[*206] Q No radical change, yeah, that "It uses as a foundation the basic core of the existing congressional districts." Would you agree with that?

A Yes. I think I already stated that earlier in my testimony today.

Q And he says, "No district is dramatically changed."

A Well, I mean, I think in fact that the 1st and 12th Districts were dramatically changed. I think that removing the area from Guilford to Durham County, the narrow corridor west of Gastonia, and the part of the 1st District that ran all the way almost to the South Carolina border--I would think they were dramatic changes, but you just stated the floor speech from the introducer.

Q And when Senator Cooper says, "What we tried to do was to make each district more geographically compact, leaving the core area for each of the present districts," insofar as he was referring to the core area for the 12th District he would be referring to the six counties shown on the map as part of the 12th District?

A It lopped off three counties on the east and one on the west and the one--the six in the middle were the core. Yes.

Q And so you are saying the same--you say the same thing with respect to the 1st District, the lopping off of the counties on the southern end?

[*207] A And I think there were maybe seven or eight counties removed, parts of.

Q Do you have any recollection as to the number of people in the noncore district that was lopped off of the 1st District?

A The number of people who were in the 1st District under the 1992 plan that were not in there in 1997?

Q Were lopped off.

A I think that in one of our submissions or maybe the prior litigation that question was asked and answered, but I don't remember the answer. It was some substantial number of people, though. I recall hearing that question and seeing the answer at some point in the past. I don't know the

* * *

[*243] A I don't know the connection to anything, but I know that one of the--one of the instructions that Senator Cooper gave me was to try to divide a fewer number--a substantially [*244] fewer number of counties that had been divided in the 1992 plan. I don't know if there was any connection between this article and survey and that instruction. I would have no way of knowing.

Q Did he tell you anything about minority representation?

A I don't understand that question. It is pretty broad.

Q Did he suggest to you at any point that it was very important to assure minority representation of the congressional delegation?

A I think our conversations indicated to me that he thought that the Voting Rights Act would require the creation of a minority district in the northeast given the *Gingles* case. I don't know if he used the word importance of minority representation in those instructions.

Q Did he refer to that in the context of the 12th District at all?

A No. He did not tell me that we should create a district that was majority black in the 12th District because that had already been ruled unconstitutional.

Q Did he tell you that it should be as substantial number as possible, up to 40--up to 50 percent?

A No.

Q Did he suggest to you anything with respect to the plans that you initially drew which--the Cooper/Winner plans, [*245] which had only 39 percent?

A He told me--the only comments on that was the--in the context of that looking at the Democratic-Republican statistics that some of those other plans were not heavily enough Democrat to ensure the election of a Democrat. And he told me a couple of times that Congressman Watt was concerned about that issue, that he did not feel that under--Senator Cooper told me that--did I say Senator Watt--Congressman Watt was concerned that some of those earlier plans you mentioned in Exhibits 1 through 4 or so that he would have trouble getting elected in that district.

Q And would that trouble be related to the absence of enough Democrats in the district or the absence of enough African Americans in the district?

A I was not told the origin or nature of the comments, just that he felt that he did not like that district and those proposals.

* * *

[*254] Q Yes. Let's start with Guilford.

A Two things: one, I think in doing the 12th Congressional District--I earlier testified we relied on election returns in our analysis. I think to a large extent--I don't know if I was using--I think I was probably using the Gantt-Helms race equally with probably the Rand-Gardner race so I am not sure if the same things would have shown up with that other race.

But I do remember discussing in Guilford County the--there are a number of precincts that appear to meet that criteria in central and western Greensboro that are not in the 12th District.

One of the things we looked at--I believe that in fact as we came down to the end, there were a number of precincts [*255] that I had put in that district, but that required removing precincts either that were more favorable in Mecklenburg County or removing precincts in between Mecklenburg and Guilford County that would have left it either point contiguity or in many cases just one precinct instead of two.

So in trying to balance the factors, I remember discussions with Senator Cooper and my own analysis that that factor had--that decision had to fail because it would either

make it worse on the other end in Mecklenburg County where there was more crossover voting than in Guilford or make the district so narrow that we ran--would run into the wrath of Justice O'Connor on the issue of shape. So that would be my answer in Guilford County.

Q How about Forsyth?

A Forsyth County, the reason those precincts were left out were very specific. Representative Burr lived in the west side of Winston-Salem. Those particular precincts were the precincts between his home precinct and the dividing line we wound up with. And we felt that taking those precincts, the ones right up to Representative Burr's home precinct, might be seen as unacceptable. I am talking about formulating the Democratic plan, not necessarily the compromise.

That would be unacceptable because Representative Burr would see more of his hometown taken, thus making him [*256] potentially threatened by a primary opponent in another part of the district. So we tried to leave as much of Winston-Salem with--in the 5th District in conjunction with all the other criteria. So those precincts were in between the boundary that we eventually drew and Representative Burr's home precinct.

Q And Burr is Republican?

A Yes.

Q And so you think that--you concluded that Burr would rather have these Democratic leaning precincts in his district? Is that it?

A We viewed them as his hometown precincts---

Q (interposing) All right.

A ---as opposed to Democratic precincts, that he would prefer those. Again, what you see in this particular shading is

the votes for Gantt that would have included a number of nominal Republicans who may have in many urban areas voted against Helms and for Gantt. And in a white on white congressional race that Representative Burr would be likely to face in the 5th District, the Gantt-Helms returns probably would not be as relevant to him as some other analysis like the Gardner-Rand analysis.

Q So you are not sure what the Gardner-Rand analysis would show one way or the other?

A No. I mean, at the time I remember looking at it on [*257] the screen, but I don't recall what it was.

Q Now what about down in Mecklenburg? Were there--are there any along the way that you see where there are---

A (interposing) The 50 and over?

Q Yeah, that is in---

A (interposing) No, nothing--nothing until you get to Mecklenburg County.

Q Then what about in Mecklenburg County?

A Well, we faced the same thing again in Mecklenburg County that we did back in Guilford, which is if you took more of Mecklenburg there is a number in the--two factors. One is looking at Gantt-Helms statistics in Mecklenburg County is a bit distorted because that was Gantt's home county.

So I think that looking at that as some prognosticator of Democrat-Republican races for Congress in general was not really the best factor because a lot of that was voting for the hometown candidate, Gantt, against the incumbent senator from Monroe or Raleigh, depending on how you look at him. And so I think that those were actually artificially inflated numbers.

But even if they weren't, I go back to the same analysis in Guilford. If you took more precincts in Guilford County since the population had to be equal you would have had to remove them either in the middle or at the end in [*258] Greensboro, so I think either of those were unacceptable. We were trying to strike a balance between making the district the most Democratic as possible and not having the same kind of shape that Justice O'Connor found so objectionable in *Shaw v. Reno*.

Q And yet you knew that by adding in Forsyth County and in Mecklenburg you would be able to come up with a district which would be more compact and would not include Guilford; isn't that true?

A Are you saying if we chopped Guilford off it would be more compact?

Q Isn't that true? If you were to---

A (interposing) In a mathematical analysis, yes; I think I answered that earlier.

Q All right. And if you added the Democratic leaning precincts that were adjacent you wouldn't have to extend the district as far, would you?

A The district would be less Democratic--if you removed Guilford County and replaced it with any combination of precincts in Forsyth and Mecklenburg County, the district would be less Democratic than the one we enacted in 1997, which was our primary concern.

* * *

[*291] Q Then on Monday, February 10th in the evening there is one to you with a copy to Leslie Winner---

A (interposing) From me.

Q From you, from you to them, "Subject: 97 Cooper 3.0."

A Uh-huh.

Q What was 97 Cooper 3.0?

A That would have been some plan that I was working on, probably the correct name of it. So it should show up on the plan list. Sometimes I would shorten it. The actual name could have been 1997 Congress Plan Cooper 3.0 or congressional plan but the--the 97 should match with the Cooper 3.0 on there, assuming I got the header right.

And this was--I was obviously asked to make some revisions in that plan because the district was still not majority black. And as I already testified, one of the things that we were trying to do to meet Section 2 [*292] requirements in *Gingles* was to make the district majority black, so this just shows me some of the changes I was making to do that at this point in time. I don't know whether these stuck or not.

Q I believe you furnished us as one of the documents Cooper 3.0.

A Okay. Yes. Yeah, probably the 97 Congress Cooper 3.0 is the same as my reference to 97 Cooper 3.0.

* * *

[*293] Q You have got--do you now have that---

A (interposing) Yes, I do. I have Exhibit 18 in front of me along with my e-mail of Monday, February 10th, 8:40 p.m.

Q Now, could you continue your comments about 97 Congress Cooper plan?

A Well, now, it doesn't---

Ms. Smiley: (interposing) Object to the form of the question. Do you know what question is pending, Gerry?

The Witness: He was asking me what the references were from changing 48.1 to 49.25 in the first paragraph. It doesn't seem to match up with the statistics on Cooper 3.0 because on Cooper 3.0 it shows the black percentage as 49.01. But it is possible what happened was that I went to Cooper 3.0 and would edit at various times and each time would just save it under the same name so it gradually changed.

So this--document number 18 is a reference to Cooper 3.0 as it finally wound up and probably this e-mail may have related to some prior version of a plan with the same name. The audit trail there would probably show what I did to 3.0. It is also possible that my reference to 3.0 was wrong and it was actually something else. But I don't know at this point.

By Mr. Everett:

Q On that memo the last line says, "I have moved Greensboro Black community into the 12th, and now need to [*294] take about 60,000 out of the 12th. I await your direction on this." What do you mean by the Greensboro black community?

A Well, in the other plans that we looked at, Exhibits 1 through 5 or 6, I believe that you noted that at one point it was just Forsyth County and then Forsyth and High Point.

I believe at some point I was instructed to include more of Guilford County in the district, and the first thing I did was

to move the precincts, as I noted here in shorthand to Senator Cooper that this probably meant the precincts that were predominantly black or maybe something like 40 percent and over or something like that the area from probably the 6th District into the 12th, which then meant it had 60,000 too many people. So I was asking him what do you want me to remove from the district if we are adding 60,000 from Guilford County into the 12th District in whatever plan I was working off of.

Q Would it be a fair reading to assume that by the Greensboro black community you were referring to 60,000 people?

A Yes, since I said I need to take 60,000 out, it probably meant that I had moved 60,000 in.

Q You didn't refer to them as Democratic or anything like that. You referred to them as blacks; right?

A That is correct.

Q And can you tie that in at all with the precincts that **[*295]** were predominantly black that were moved in at that particular point?

A Well, generally the first thing--the first thing I would do because it was the easiest thing is to take--I was familiar from having worked on plans for 15 years of where the Democratic and black concentrations are in Greensboro.

And the first thing I did was to move the precincts--I think it was probably the precincts in Senator Bill Martin's Senate district or the two predominantly--the two House districts in Guilford County represented by blacks. Probably I moved those into the district first.

And after that I remember going around the edges of the district in the 12th adding in precincts that were heavily Democratic because I already knew that the precincts that were in the predominantly black areas were heavily Democratic. And then I remember going after that--going around the edge looking at all the Democratic precincts that surrounded either the Senate or House districts.

Q Is Senator Martin a state senator that you are referring to?

A Yes, he is.

Q Is he African American?

A Yes, he is.

Q And how many African Americans are there in his senatorial district, if you know?

[*296] A I think it is--the total population may be 54 percent black, 53 percent, something like that. I am not quite sure. I don't---

Q (interposing) With respect to--I'm sorry.

A I don't have that information in front of me.

Q With respect to the map which is attached as Congressional Cooper 3.0---

Ms. Smiley: (interposing) Are you talking about Cohen Exhibit 18?

Q Yes, I'm sorry, the last page there.

A Yes.

Q Does that reflect the moving of the Greensboro black community into to the 12th district?

A Well it has got some dots there that go into central Greensboro on that map, which would have indicated probably that was my first attempt at adding Greensboro to the

12th District. So that probably reflects, looking at the shape, just adding at that stage the precincts that were, you know, 99 percent black and 99 percent Democrat. That is probably what I started with.

Q Now, up to that time would it be true that Greensboro and Guilford--well, Greensboro had not been included in the maps that you had constructed?

A Well, there were several different tangents going on. Of course it was in the 1992 plan that we had done. But [*297] Exhibits 1 through 5 show the district as being just in Forsyth County and then into High Point. Then it went into Greensboro.

I think that there were other series of plans. There is other plans with similar names. For instance, the Martin plans I think all had Greensboro--that series of Martin plans that I had done prior to that all had Greensboro in it. I think there was another series of plans that had Greensboro in it, but I think this was evolving from the Exhibits 1 through 5, this particular trail then including Greensboro in it. I don't know whether this particular thing wound up being the committee plan or it would up being a dead end somewhere.

Q Is the Greensboro black community different from the High Point black community?

Ms. Smiley: Object to the form of the question; if you can understand that reference.

Q At least as you used the term---

A (interposing) Well, Greensboro is a different city than High Point. Probably--from that Exhibit 5 or 6 where High Point was already in the district probably it was extending on

into Greensboro. I mean, this is one plan out of a hundred from two and a half years ago.

Q Do you remember how many predominantly black precincts in High Point were included in the 12th District?

[*298] A Which 12th District?

Q In the 1997 plan; I'm sorry.

A I do not remember.

Q Are most of the predominantly black districts in High Point in Guilford County as you recall, or if not, how many of them are in one of the other three counties which you say reach High Point?

A Forsyth County only has like 20 registered voters in High Point in it and the areas in Davidson and Randolph County in High Point I believe are like 98 percent white. I think there may be 1,000 in each county.

Q So that as a practical matter in High Point all of the African Americans are located in the Guilford County portion of High Point?

A Yes. That is correct.

Q Now, with respect to the move of the Greensboro black community into the 12th, where did you take 60,000 out of the 12th District, if you recall?

A I don't remember; most likely the--usually when I--there was a number of times in different tracks--on these 100 plans that I went down usually it would involve taking precincts out of Davidson, Rowan, and/or Mecklenburg.

Q Would it be a fair inference that most of the 60,000 that were taken out of the district would have been white?

A They would have been predominantly white or [*299] predominantly Republican; yes.

Q And would it also be true that as of this time Durham and Gastonia had already long earlier been removed from the plans entirely?

A I have testified already yes, that is correct.

Q So the evening off--the making up for the move of the Greensboro black community into the 12th District was the removal of white Republicans from other districts?

A Other counties.

Q Other counties?

A Other districts, too.

Q Yeah. Other---

A (interposing) Yes; into other districts from other counties.

Q Into other districts?

A Yes.

Q Do you have any sort of--you said white Republicans. To what extent are you--well, put it this way: was it 100 percent white Republicans?

A I would have gone along the edge of the district all the way around removing precincts consistent with keeping the district contiguous, et cetera, that were the most heavily Republican is what I would have removed any time I had to add something.

Q Well, wouldn't there have been inevitably a number of [*300] white Democrats that would also have been taken out?

A Yes. I don't know of any precinct that is 100 percent Republican.

* * *

[*313] Q There is a memo of March 14 indicating "The attached compares Senate Plan C2 with House Plan G." Is this another [*314] instance of a comparison as to precincts that are different between--or units that are different between the two plans?

A Yes. These are two later plans that were in negotiation between the House and Senate.

Q And the same explanation would apply to these as to the earlier one?

A Yes, sir.

Q With respect to Davidson County, what--with respect to those two precincts that are in one instance to be in the 12th and the other in the 6th, can you explain where those precincts were with respect to Davidson County, what portion thereof?

A Well, Ward Number 6 is either in Thomasville or Lexington. I am not sure which one it is in. And I am not sure where Cotton precinct is.

Q Do you know whether either of those is predominantly black?

A I do not know.

Q Do you know whether either of those is predominantly Republican?

A I do not know.

Q In Forsyth County where is the Brown/Douglas Recreation precinct?

A Somewhere in the city limits, but I don't know where.

Q Guilford County--well, let's see. Granville County, [*315] that is between the 1st and the 2nd. How did that work out in the final plan?

A That was probably the change that I mentioned that was requested by a member from that area. Right, it is. It has got Butner and Creedmoor, which I had testified to earlier being moved from the 1st to the 2nd. Brassfield and Tally Ho are along the Durham County line as well.

Q Now, in Guilford you have a GB-18 and a GB-35C, and one the precinct--well, sort of--one is in 6 in one plan and 12 in the other and vice versa. Do you know what that involves?

A No. Most likely it was trying to get the population equality right so precincts in Guilford were switched, possibly even irrespective of anything relating to their characteristics of the precinct but trying to get the population equal. That is probably what happened on this one.

Q And you are unaware of either the racial demographics or the political voting results in those two counties?

A Certainly not from memory; it would be in the--it would be in the statistics available.

Q In Iredell County in the Senate plan, C2, there are a number of precincts that are placed in the 10th District and in the House plan those same districts would be in the 12th District. Can you explain what is involved there?

[*316] A The House proposal had more of Iredell in the 12th District, and my recollection is that Senator Cooper did not like that idea because they were predominantly Republican and did not--I don't know whether--which was the final result, but I remember that he characteristically did not want any more of Iredell added because it was very heavily Republican.

Q Do you remember any characteristics racially one way or the other?

A I think Chambersburg is about 40 percent black, but I think the Coddle Creek and Barringer are overwhelmingly or almost all Republican white.

Q Looking at Jones County, where in the Senate plan five precincts are in the 1st District--I mean in the 3rd District rather, and in the House plan they are all in the 1st, can you explain what is involved there?

A Well, this eventually--since eventually all but one precinct in Jones County wound up in the 1st District, then the House position must have prevailed here. These are probably the five precincts. I think the earlier Senate plans had all of Jones in the 3rd District and the House had proposed moving five of the six precincts. And I think the Senate agreed to this change eventually.

Q Do you know anything about racial characteristics or political characteristics of those five precincts?

A Jones County is very heavily Democratic and the county **[*317]** as a whole is probably 45 percent black, but I don't know anything specific about those precincts.

Q With respect to Mecklenburg County, do you recognize the location of any of the precincts that are listed there from what is stated here as the designation?

A Yes. The House had proposed putting Cornelius, Crab Orchard to Davidson, Long Creek 1 and Charlotte 105 in the 12th. Except for Davidson all of those precincts are heavily Republican.

I believe that the Senate--that these precincts, Charlotte's 5, 35, 45, 62, 84 and 95, are precincts my recollection is that are Democratic precincts that the Senate

wanted to put in the 12th District, or more Democratic than other precincts in the county anyway.

Q And do you recall---

A (interposing) Certainly more Democratic than places like Cornelius and Crab Orchard.

Q And do you recall how that finally was resolved?

A No, I do not.

Q On Person County there seem to be a number of the precincts that are in the Senate plan would have gone into the 4th District and under the House plan would go into the 1st. Can you describe what is involved there and what the resolution was?

A I think this was in the--this was part of moving--I am [*318] trying to think. Roxboro--Roxboro wound up being in the 1st District, so it looks like on this particular issue they were deciding--I mentioned earlier that Granville and Person were being divided and there was obviously a difference of opinion between the Senate and House how to do it. Roxboro--all of Roxboro wound up being in the 1st District eventually, so I guess the House position wound up prevailing here on how to divide Person.

Q But Person was divided ultimately?

A Yes.

Q And Roxboro is what, in the southern part of the---

A (interposing) Central part of the county.

Q Central part. Pitt County, is the divergence between--well, let me ask you this. In the Senate there are four counties that are placed in the--I mean, four precincts that are placed in the 1st District. Those same counties in the House plan are placed in the 3rd District.

A Yes.

Q Are those the precincts that were involved with--well, how many of those precincts are involved with location of Farmville and access to there?

A I think Arthur and Simpson are the ones between Farmville and the southeastern part of the county. I am pretty sure. But this would have been the change that the Senate wanted to put Walter Jones in the 1st. I am not sure [*319] why at this point the House's position that Jones be in the 3rd.

There were a lot of negotiating points that went on that you would see a proposal from the other side and you would think "They don't really want this. They must want the other thing," which you never know why in bargaining-- somebody sometimes will ask for something they really don't want because they don't think you will give it to them.

Q Moving down to Rowan County---

A (interposing) Yes.

Q ---you have Bradshaw, Enochville and West Ward, three precincts that in the Senate plan were going to be in the 12th District and in the House plan would have been in the 6th?

A Uh-huh.

Q Who was the--okay. Who was the incumbent for the 6th District at that particular point?

A Howard Coble.

Q With respect to those particular districts, what was the resolution in terms of where they were placed?

A I don't know the eventual conclusion. That would be in our submittal.

Q Do you know anything about the demographics of those districts?

A Bradshaw and Enochville are predominantly Republican, **[*320]** and I don't know where West Ward II is.

Ms. Smiley: Mr. Everett, I would note that it is 6:35 and I hope you would finish at least by 7 o'clock.

Mr. Everett: I think I can assure you I will.

Ms. Smiley: Well, we have exceeded the six hour limit. Let's finish up.

Mr. Everett: That is great.

By Mr. Everett:

Q So this comparison that we have just been going through indicates the points of difference that were still outstanding on March 14?

A Right. And that was--at some point in time I was asked to run that report. There were lots of other plans. There were sometimes several a day put forward by each side. This was a case--they must have been--they must have been serious about at that point those two plans because I was asked to run a report. So that must have been some significance on each side to that particular plan, but I don't know whether that was the penultimate or middle or where it was in the process of negotiating.

Q And there is a reference on March 14th also in your memo to Senator Cooper that information on the House Plan G has been sent to the NCEC, which was processing it.

A Yes. Senator Cooper would have asked me, you know, "Let's look at statistics on the House's latest proposal from **[*321]** a partisan standpoint."

Q Then in the next document, which bears date of March 18th, 1997, there is a reference to various documents that have been filed and the location of particular precincts that apparently was the subject of earlier discussion.

A Uh-huh.

Q And are all of these precincts so far as you can determine among those that are listed in the earlier enumeration of differences?

A This is a draft--in other words, the actual memorandum on March 18th or 19th may or may not be the same as this draft. This was a draft--the reason I included it here, it was a draft of a memo and I don't know whether it was a change between that and the one that actually accompanied Senate Bill 433.

But what I did here is basically outline the details of the plan and what was divided and if we had to go to zero deviation what changes would have to be made, which I discussed were--had no political consequence, but might be needed to satisfy the *Karcher* decision.

Q And on the date of that memo you forwarded the memo to Senator Cooper for his inspection?

A Yes.

Q Then there is a memo of March 19th, and what is that, if I may ask?

[*322] A Well, this was near the very end of the negotiations, and the two points in controversy at that point between the House and the Senate were--Sampson County and Wake County were the two issue left at that point in negotiations. And this memo talks about what the outstanding

differences were in that point in time. That was all that was left of negotiations at that point.

Q And so those pertain to districts other than those that are directly involved in this litigation?

Ms. Smiley: Object to the form of the question. You can answer if you can.

A Well, the legislative process is one of compromise, and every district was part of the legislation in the 1997 plan and the--just like many of the decisions that I have already testified had nothing to do with race.

These last points of discussion between the House and Senate had to do with differences between the 2nd, 4th and 7th District, nothing--many of the final negotiations and discussions had absolutely nothing to do with the 1st District or 12th District.

Q And would it be true that these districts might have had a ripple effect that could have affected the 1st and the 12th or would that have been as a practical matter impossible?

A At this stage on March 19th, the discussions were the **[*323]** 2nd, 4th and 7th Districts had not yet been finalized. I believe everything else had been agreed to at this point in time, the night before the final compromise was reached.

Q So everything on the 1st and the 12th had already been agreed upon at that---

A (interposing) I can't tell you if at the last minute some final change was made, but my recollection is that a lot of the discussions had to do with precincts in north Raleigh and Clinton, and I think they had absolutely nothing to do with anything except partisan politics.

[*18] Q And in drafting the plan, did you pretty well proceed on the premise that if there was a high percentage of African Americans, there would be--and who were registered to vote, that there would be at least that high a percentage of Democrats registered to vote in a particular precinct?

A We did not use registration figures in determining how we were looking at a precinct or a county or a district in a partisan manner. Registration numbers were meaningless to me.

Q How about in matching up the voting results in those three races that I mentioned? Was it pretty clear to you that the African Americans who had registered had voted as Democrats?

A I did not do that analysis and that did not enter into **[*19]** my thinking. We were looking at it on a partisan basis. It didn't matter what the race was. But it would not surprise me that that would be a relatively high number.

Q Incidentally, if you are looking at something on a partisan basis and were trying to assure--and you are a Democrat; right?

A Yes.

Q In trying to assume a Democratic perspective, if you wanted to have some sure thing Democrats, you couldn't do any better than North Carolina than having a large number of African Americans in the particular precinct, could you?

A Well, nothing is ever a sure thing, but obviously African Americans as a general rule are supportive of Democratic candidates in many instances; yes.

* * *

[*36] Eventually it became my belief that there should be a majority minority district in the 1st District, but I can't remember at that time whether I believed that. I don't remember.

Q Why did you come to the belief that a majority minority district should be there?

[*37] A In the 1st District?

Q Yes.

A There was evidence presented to the judiciary--excuse me; the redistricting committee that Section 2 of the Voting Rights Act would require it. And then in drawing the district as we moved through the process, it was very easy to draw a compact--functionally compact district and have a majority minority, which I think would be evidenced by the initial plan that I presented to the senate committee.

Q You used that term "functional compactness." What does that mean?

A It means a district that is reasonably compact and that you pull together communities of interest, with like interest, and you put them together in a district. I think it means that it is not--it is as absolutely mathematically compact as it possibly can be, but that there are other criteria that you use as well.

Functionally compact can also mean that we take election results into consideration to make the district so that it would pass both houses of the General Assembly as well.

(Mr. Cohen exits at 2:25 p.m.)

Q So functional compactness also includes making sure that the political results are concerned--are considered?

A Yes, specifically because of what we had to do in [*38] getting the plan passed.

Q Now, in reading some of these Supreme Court cases to whatever extent you have read them, did you come across the term "geographic compactness"?

A I don't specifically recall that, no.

Q Did anybody--were you advised that functional compactness was a permissible criterion?

Ms. Smiley: Object to the extent that you are asking whether or not he received any legal advice.

A I think functional compactness is a term that we used to describe what we did. I mean, it--I don't think it was lifted from any case, to my knowledge. It was something to put a good description on what we did.

Q Is racial fairness part of functional compactness?

A Yes.

* * *

[*53] Q Now, at a later time when you were presenting I guess Plan A, did you talk to the members of the Senate or maybe the committee there, the redistricting committee, about some of the things you had considered in drawing the plan?

A Yes.

Q Do you remember telling them that--in words to the effect that since this was less than a majority African Americans and it was not majority white that it was not subject to the requirements that would apply to a majority black district?

Ms. Smiley: Object to the form of the question; did you say District 12?

Mr. Everett: Pardon me?

Ms. Smiley: Did you reference District 12 or a specific district, or are you just asking the question generally?

Mr. Everett: I am asking him with respect to the 12th District.

The Witness: The 12th District.

Mr. Everett: In Plan A, yeah.

The Witness: Yes.

[*54] Ms. Smiley: I just don't think you said District 12.

Mr. Everett: Okay; I'm sorry.

The Witness: Yes, I recall saying that in my belief one of the arguments that the district would be constitutional would be that it was not a majority minority and I believed that that was a very good argument that the district was constitutional.

By Mr. Everett:

Q Had you been advised to that effect by anyone?

Ms. Smiley: Object to the form of the question to the extent that you are asking for legal advice. If you want to ask about any other people who informed him, that's fine.

Mr. Everett: Okay. If I understood you correctly, you are saying you object insofar as to ask for whether it is legal advice---

Ms. Smiley: (interposing) Well, if it is asking for the advice of--you know, any advice given by the Attorney General's Office and legal advice, I mean, you know, it is privileged, anything we say to him. But if you want to ask him nonprivileged communications---

Mr. Everett: (interposing) Okay.

By Mr. Everett:

Q So you did consult extensively with the Attorney General's Office?

[*55] A Yes.

Q And regardless of what they advised you, you came to the conclusion that a majority--that unless it was a majority black district it was not subject to the same requirements as a majority black district?

A I didn't come to that conclusion; I came to the conclusion that that was a good argument to argue the constitutionality.

Q Do you remember---

A (interposing) I think when I began doing that was when someone questioned the constitutionality solely on the basis that he thought that it was unconstitutional because you said it was. And so at that point I needed to make some arguments as to the constitutionality. And in addition to all of the other arguments I made, that was one of the arguments that I made to the Senate.

Q Let me just ask you whether this sounds like what you said concerning the 1997 plan:

> "I believe that this new 12th District is constitutional for several reasons. First, and maybe most importantly, when the Court struck down the 12th District it was because the 12th District was majority minority and it said that you cannot use race as the predominant factor in drawing the districts.
>
> Well, guess what. The 12th District, under this [*56] plan, is not majority minority.

Therefore, it is my opinion and the opinion of many lawyers that the test outlined in *Shaw vs. Hunt* will not even be triggered because it is not a majority minority district and you won't even look at the shape of the district in considering whether or not it is constitutional. That makes an eminent amount of sense because what is the cutoff point for when you have the trigger of when a district looks ugly? I think that the court will not even use the shape test, if you will, on the 12th District because it is not majority minority. It is strong minority influence, and I believe that a minority would have an excellent chance of being elected under the 12th District."

Is that what you said?

A I recall saying that in addition to making other arguments as to the constitutionality.

Q When you speak of your opinion, you, of course, are a lawyer?

A Yes.

Q And soon may be the chief legal officer for the State of North Carolina?

Ms. Smiley: Object to the form of the question.

Mr. Everett: All right.

Ms. Smiley: It is not necessary to answer that [*57] question. Senator Cooper has already told you he is a lawyer but he is not a redistricting lawyer.

Mr. Everett: Well, let me just finish the question.

By Mr. Everett:

Q And the opinion of many lawyers that this test and so forth don't apply, did you talk to other lawyers besides those in the Attorney General's Office?

A I don't recall specifically whether I did. I came to the conclusion after talking to lawyers that that was a very good argument to make. I had not even thought of this while drawing the plan. I thought of the argument after the plan had been drawn that hey, this is not a majority minority district so why should it even be triggered. It made common sense.

I didn't base it personally on any case law. I didn't do any research and I am not a redistricting lawyer. But it makes common sense. I ran this opinion by some lawyers, and they told me it was a good argument to make, so I did.

Q So you as the chair of that committee made that statement for the legislative record; correct?

A Yes.

Q And did you at any time prior to the enactment of the 1997 plan ever say anything to the Senate or to your committee wherein you purported to withdraw or limit that [*58] particular statement?

A No.

Q So what you said then as far as you were concerned remained the last word right on through until the plan was enacted?

Ms. Smiley: Objection; what do you--I mean, if you can answer what you said meant was the last word---

Q (interposing) As far as you were---

Ms. Smiley: ---you can try to answer that. But I object to the form of the question.

A That as far as I was concerned remained one of the arguments to be argued that the district was constitutional.

Q Now, when you all started to draw the plan, did you outline certain purposes that were to be served?

A Yes, sir.

Q Contiguousness was one of them, wasn't it?

A The purposes were to correct the constitutional defects in the district and to have a plan that had a partisan six-six balance so that it would get enough votes in the Senate and the House to get it passed. Those were the prime directives.

Q And with respect to the purposes, when you were drawing the plans--or when then plans were being drawn back in the 1996 period after *Shaw v. Hunt*, were you concerned with partisan balance at that particular point?

[*59] A I don't recall for certain. When the partisan balance issue became crystallized was when after the '96 elections we had a six-six split. I don't specifically recall thinking about drawing plans before those elections. We may have, but I don't remember. And I don't know when the dates on these particular plans were. I just--I just don't recall.

* * *

[*62] Q Now, with respect to the route followed, isn't it true that in the plan that was ultimately adopted, the '97 plan, you don't follow 85; you go out of Greensboro onto 77 and go up and pick up some black precincts in Statesville and Salisbury and then come back over to 85 and at various points depart from I-85? Wouldn't that be true?

Ms. Smiley: Object to the form of the question.

Mr. Everett: Okay.

Ms. Smiley: Object to the characterization. I don't think he said that he has gone out and picked up black precincts anywhere.

The Witness: Yes.

Mr. Everett: All right.

The Witness: You know, I can't specifically remember where the interstate is in regard to this, but it is in the general vicinity of the areas between Guilford and Mecklenburg County and in the general travel route as far as [*63] I remember.

By Mr. Everett:

Q Well, if you were traveling from--the best you remember, if you were traveling from Greensboro to Charlotte, could you have done so and stayed within that district and followed the most direct route?

A We had to pick up enough population along the way to make a district. And basically in drawing this district we looked at the community of interest. We put together what we believed to be a functionally compact district between Guilford and Mecklenburg County. But the driving force behind it was the partisan balance issue.

Just going back to this map, as I recall, when this idea was discussed of going from Charlotte to Winston-Salem I said that that made no sense because we need to keep, number one, the Triad together, and number two, there are really no areas around the 12th that need help from Democratic leaning voters in Guilford and Forsyth and Davidson and Rowan and Iredell and Mecklenburg. So why not go ahead and let's put all of

those Democratic leaning voters based on election results in the 12th District and make it a solid Democratic district?

And that was the--it may be even more of a driving force than the community of interest. Although the community of interest was important, it was important not to separate [*64] the Triad because they are sort of an entity. And to pull Winston-Salem out and pull it away from High Point and Greensboro, that didn't make geographic sense.

Q So you are saying that High Point and Winston-Salem should be kept together. And are you saying---

A (interposing) And Greensboro.

Q And those should be tied in with Charlotte?

A Yes.

Q Okay. And so---

A (interposing) The Democratic leaning voters in those districts.

Q And those---

A (interposing) In those areas.

Q And for the most part, those were African American; right?

A I don't know if you could say for the most part. It is a not a majority minority district. So I wouldn't characterize it as for the most part.

Q Well, let's put it this way: as far as those three counties that include Charlotte, Greensboro, High Point and so forth, each of those counties is--the portion of each of those counties that is included in the 12th District is majority black, isn't it?

A Say that again.

Q Okay. Take--there are six counties in the 12th [*65] District---

A (interposing) Okay.

Q ---as it was drawn. Isn't the portion of Guilford County that is in the 12th District majority black?

A I really---

Ms. Smiley: (interposing) I am going to object to the form of the question. I mean, this is---

A (interposing) Well, I don't remember.

Ms. Smiley: This is population data that is in the record, and for you to expect--unless Senator Cooper absolutely knew and that is what he was using, I don't see any point in him trying to guess or speculate.

Mr. Everett: Well, we are trying to find out what he did know and what he---

Ms. Smiley: (interposing) Well, why don't you ask him if he knows, not whether it is true?

Mr. Everett: Well, I am asking---

Ms. Smiley: (interposing) Ask him if he knows---

The Witness: (interposing) I don't remember; I really don't remember.

By Mr. Everett:

Q All right; the same question with respect to Forsyth?

A I don't remember that. I know that they were mostly Democratic leaning. And I really don't remember.

Q And did you know that--you did not know they were [*66] mostly--you did not know whether they were mostly black?

A Well, yes; I knew that there were a significant number of African American voters there, yes. And we didn't ignore that fact. I mean, that is true. I don't know whether I would

characterize it as mostly, but there were African American voters there.

Q And is it true that you--well, didn't you proceed on the premise that they would--the African Americans would be registered as Democrats and vote as Democrats?

A We didn't look at registration data. We looked at election data.

* * *

[*68] Q Now, with respect to the 12th District as it currently--well, as it was in the 1997 plan, if it is-- assuming for the moment that it was being viewed as being constructed with a predominantly racial motive, are you aware of any compelling governmental interest for its being constructed as it was?

Ms. Smiley: Object to the form of the question.

Mr. Everett: Okay; I will rephrase it.

By Mr. Everett:

Q Do you know of any compelling governmental interest [*69] for the 12th District having the form that it now has?

Ms. Smiley: Objection; are you asking for a legal conclusion?

Mr. Everett: Pardon me?

Ms. Smiley: Are you asking for a legal conclusion?

Mr. Everett: I am asking him for his personal conclusion.

Ms. Smiley: Okay; then you can answer.

The Witness: Going back the community of interest, you mentioned traffic congestion. That is an issue---

Q (interposing) I'm sorry?

A You mentioned--going back to the communities of interest, it comes to mind that you mentioned traffic congestion in Winston-Salem and Greensboro. That is also a significant problem in Mecklenburg.

I think a largely urban district has a lot of common problems that government can try to address and that a member of Congress from that district can try to address, so I think that certainly the community of interest in that area is a governmental interest.

Q Any other compelling government interest that comes to mind?

A I think as opposed to the '92 plan, it is much easier to know what district you are in. There are no split [*70] precincts, as it were. I think there is one that was maybe a satellite annexation in the 12th. But everybody in the same precinct knows what district they are in. So I think that that helps clear up matters significantly.

Q Okay. And---

A (interposing) There may be others. We considered a lot of issues when we drew these maps that I can't recall at the moment, but there may be others.

* * *

[*70] Q Senator Cooper, with respect to the 1st District, are [*71] you able to state any compelling interest why that had to be--why that was drawn as a predominantly--well, pardon me; as a majority black district?

Ms. Smiley: Object to the form of the question; I assume you are not asking for a legal conclusion?

Mr. Everett: No; just personal.

Ms. Smiley: To the extent you can answer---

The Witness: (interposing) Compelling governmental interest---

By Mr. Everett:

Q (interposing) Right.

A ---as to why it was majority---

Q (interposing) Uh-huh.

A I think there are compelling governmental interests as to why it was drawn as it was. It is a largely agrarian district. The northeastern part of the state is generally probably one of the poorest areas of the state.

There are a lot of concentrations of the Tier 1 counties under the Bill Lee Act to get greater tax incentives for poorer counties. There are a lot of those concentrated in the northeast. They have a lot of problems that are related to their rural nature and the poor nature. And all of that, I think, helped make us decide to draw a district up in the northeast.

As to why it was majority minority, first we did [*72] believe that under Section 2 of the Voting Rights Act that it needed to be majority minority, but that we could draw the district in a functionally compact manner and still have majority minority. And historically that district in that area, oftentimes the 2nd District in history, had a large concentration of African Americans that lived there.

So I think with all of those reasons we came to the conclusion that the district should have been drawn as it was.

I think really that the district that I presented to the Senate was a little better than the district we ultimately ended up with.

Q What do you mean in that regard? Can you explain that?

A I think probably it was a little more functionally compact than the district that we ended up with. But there were partisan considerations and the effect of the 3rd and the 2nd and all of the negotiations that went on there that required the additional changes that we made in the 1st District.

* * *

[*74] Q And that was not one of your express objectives anyway to have geographic compactness?

A I think geographic compactness, having people close together as much as possible, is part of being I guess this term we coined functionally compact. That is a component of communities of interest.

Q Well, now, you were aware, weren't you, that when you created the 12th District in the 1997 plan you were splitting each of the six counties in that district?

[*75] A Right. And most of that had to do with the partisan nature of the district.

Q And also with maintaining the core; right?

A That is part of it, yes. But most of that had to do with the partisan nature of the district.

Q And so is it your testimony, then, that the 12th District was going to vote Democratic? Is that it?

A I don't think anybody can absolutely predict, but from the election results that we analyzed District 12 would be a strong leaning Democratic district; yes.

Q Okay. Would you also have been able to predict that the Democratic candidate to be elected would be African American?

Ms. Smiley: Object to the form of the question; if you can attempt to answer that question, go ahead.

A No, I don't think you could predict that. I do think an African American would have a good chance at winning that district; yes.

Q Has it been your experience that African Americans have a strong desire to have persons of their own race elected to public office?

A I think that many African Americans believe that there need to be more people elected to public office who are African American; yes.

Q And is that part of the concept of racial fairness, [*76] having more persons of minority groups, minority ethnic or racial groups, elected to office?

A I think that racial fairness means making--well, racial fairness means that you have a district where an African American would have a good chance at winning the election; yes.

* * *

[*77] Q Did you have any contact Representative Watt or any person who purported to be acting in his behalf with

respect to the percentage of African Americans to be included in the 12th District?

A Well, first I talked with, I think, every member of Congress or their representative except for Congressman Taylor. I don't believe that I talked with anybody in his office with respect to the 11th District. But yes, I did have conversations with Congressman Watt and with representatives of his office concerning many things involved with the 12th District. And one of those would have been race, yes.

Q And in the course of any of those discussions was it indicated that he would like to have as high a percentage of African Americans as could reasonably be pût into the district?

A He wanted to maintain as much of--as many of his constituents as he had under the old plan; yes. He wanted to keep as much of that as possible.

[*78] Q And by constituents did he identify which constituents, by race or otherwise?

A He wanted to keep as much of his district as he could. But that was a goal of many of the members of Congress with whom I talked because of the fact that they send letters and communicate with each other, and so he wanted to do that.

Q So he wanted to maintain as many of the voters from the original 1992 plan 12th District--he wanted them to be--continue in his district to the greatest extent possible?

A As much as the constitution would allow under the constraints of *Shaw v. Hunt*, yes.

* * *

[*80] believe you said something to the effect that among the factors you took into account in configuring one of the [*81] districts was race. What did you mean by taking it into account in this context?

A Racial fairness was one of the factors that we considered in drawing the districts.

Q And racial fairness was what?

A We wanted to draw districts that cured the constitutional defect in the plan but still maintained the core of the plan. And racial fairness was a part of that.

Q Maintaining the core of the plan was in your view part of racial fairness?

A Uh-huh.

Q Okay.

A Yes, it was.

Q Somewhere along the line according to some notes I had, you said that back in February of 1997 in talking to the Senate committee, "What we tried to do was make each district more geographically compact leaving the core are for each of the present districts." There when you were referring to geographic compactness, what did you mean?

A Making it look prettier.

Q Okay; maybe I need to get you to clarify what is pretty and what is ugly in this context.

A I guess it is up to the Supreme Court. I think that specifically the court did not like one county having three congressional districts. The court did not like the double [*82] crossovers and point contiguity and long areas where you didn't have any people connecting counties and precincts and

areas. And putting things more geographically together was one of the issues that we looked at.

Q So that---

A (interposing) Not as many counties being split, trying not to split precincts; I think that is all part of geography.

* * *

[*104] A I just don't know. I mean, racial fairness was important, and having a plan that was racially fair was important to me, and it was important to other legislators with whom I---

Q (interposing) And racial fairness is like minority representation?

A Well, having an African American fair shot to winning a congressional district, yes.

Q And what is necessary for a fair shot?

A I think what we did is a good example of that.

Q When you---

A (interposing) But keeping in mind that you have got all the other constitutional criteria to meet at the same time.

Q Well, let me ask you this: in 1997, in March or thereabouts, to give African Americans a fair shot, you created a 12th District with about 47 percent black; is that right?

Ms. Smiley: Asked and answered, and he has also indicated 47 is an approximation.

Q About that; okay?

A Yes, I do think that would give an African American a [*105] fair shot to win that district; yes.

Q And then in 1998 did you also try to create a 12th District that would give an African American a fair shot?

A Yes. I mean, that was one of the factors in drawing the district in 1998; yes.

Q And at this time it was about what, 35 percent?

A I think that is right. I don't remember.

Q Significantly less, in any event?

A I don't remember specifically, but yes, it was less.

Q Can you explain why it was necessary to have that 47 percent or whatever it was, that significantly higher percentage, in 1997 and then the legislature went back and cut it back to 35 percent?

Ms. Smiley: Object to the form of the question if you are implying in any way that the legislature voluntarily went back and did that. If you can answer the question, go ahead.

A What we did between the '97 and '98 plan is read--and I don't remember it all now, but at the time we read line by line the three court--three judge panel's decision. And we tailored the '98 plan to try to address every problem that they pointed out with the plan. And that is how we drew the '98 plan.

Q Still trying to give a fair shot, right, to---

A (interposing) That was, yes, one of the factors. But **[*106]** the overriding factor at that point was going through and addressing the court's issues and drawing a plan that would be constitutional.

Q But you were still doing it for partisan fairness and incumbent protection, the same objectives?

A All those objectives were there, yes.

Q Could you answer this? Why couldn't you have created a district with 35 or so percent in the first place to give

minorities--a minority candidate a fair shot and not had a six county district all of which were split, et cetera?

A A couple of reasons: one, we felt that we had complied with *Shaw v. Hunt* with the district that we drew. We significantly shortened the district--you are talking about going from Gastonia to Durham--and significantly shortened it, significantly widened it, kept communities of interest.

And as I told you before, basically you were wasting Democratic leaning voters when you look at the issue of partisan balance if you simply put those Democratic leaning voters in surrounding districts, which are Republican districts anyway.

Q Well, let's see; Congressman Hefner, he was there at that time, right?

A That is correct, but there was really no way to help him. Cabarrus is his home county and he wanted all of that **[*107]** in his district. But there was really no way to help Congressman Hefner with the 12th District.

Q How about putting some of those folks in from Mecklenburg County?

A Congressman Hefner I don't believe was interested in representing part of Mecklenburg County.

Q You don't think he would have liked to have had black--would have liked to have had black Democrats from Mecklenburg?

A That never was requested by him and it never came up in our discussions.

Q So nobody ever suggested that as an alternative?

A Well, no; I am not saying that. I mean, I think Senator Cochrane presented a Mecklenburg to Robeson plan on the

floor, so that yes, it was suggested but it never did enter my way of thinking as what we ought to do.

Q Well, what I am wondering about is the extent to which you looked at the alternatives around about there and decided that it would be a waste to take any of these solid Democratic voters, African American voters, and put them in some other district where they could help Democrats.

Mr. Stein: Object.

A Well, as I have said earlier, the surrounding districts were all solidly leaning Republicans. And from my conversations--like I said, I talked to all the members of **[*108]** Congress or representatives except for Congressman Taylor. And from my conversations with those folks they were fine with the 12th District as we drew it.

Q And Congressman Watt was particularly fine with it; correct?

A Well, I think Congressman Watt had some public comments that he did not want to lose the constituents that he had before. But I think that he accepted the plan because he understood the court's decision---

Q (interposing) He had no choice, did he?

A ---and he accepted it. No.

Q Well, when you reduced the number of African Americans in the 12th District by some 10 percent at least in 1998, these were all--virtually all Democrats; right?

A That is correct.

Q You had no---

A (interposing) Now, wait a minute; no. Okay. Ask your question again.

Q Okay. My question is in some way or other you went from 47 percent to around 35 percent?

A Because we followed the lower court's order; they said the district was not constitutional. We disagreed, but we had to do it.

Q Yeah.

A So we did it.

[*109] Q And that meant removing 10 percent of the population of the 12th District and putting it somewhere else; is that what---

A (interposing) That was a natural occurrence of complying with the court's order; yes.

Q Okay. Now, and that was all--they were all--virtually all Democrats; right?

A I mean, you know, I don't remember specifically. Yes, the part in Guilford that we included in the 12th was strong leaning Democrat. And I don't want to characterize it as virtually all were Democrats, but it was a strongly leaning Democratic voters. And yes, they were taken out of the 12th and put into the 6th, Congressman Coble's district.

Q And all of those were black, correct, virtually?

A No.

Q What percentage of those that were---

A (interposing) I told you I don't remember the percentage of African Americans. It was a strong Democratic leaning area.

Q And that being--taking this Democratic leaning group and putting them in Coble's district, was that just a waste of the Democratic votes? Is that the way you viewed it?

A Huh-uh. I don't want to characterize it as that, but I don't think it would have affected Congressman Coble's district so that a Democrat could be elected.

* * *

[*112] Q Now, if you look at some of these plans, the Winner/Cooper plan back in 1996, back in the summer of '96, you will find districts which are pretty much like the 12th District in 1998?

A There were some plans that were fairly close to that; yes.

Q My basic question then is why didn't you adopt one of those plans in 1997 instead of going for a much higher percentage of African Americans?

Ms. Smiley: Object to the form of the question; he hasn't said that the reason they adopted the plan they did was because of the percentage of African Americans in the 12th District.

Q I am just asking you why they didn't do it.

A Going back to the partisan issue of going ahead and [*113] making it a strong Democratic district where you really could not help any of the surrounding district, going back to the partisan issue.

Q But isn't it true you knew very well if you had 47 percent African Americans in that total population it was going to at the very least be Democratic?

A Yes. Well, yes; I mean, we looked at the election results of that district, and yes, we knew that it was going to be a strong Democratic district.

Q And you didn't even really have to look at the election results, did you?

A But we did; I mean, we did pretty specifically look at it.

Q And that confirmed pretty much what you would have anticipated anyway; correct?

Ms. Smiley: Object to the form of the question; he said that he looked at election results. He didn't make other inferences.

Q Did anybody tell you--go ahead.

A I think--I am not even sure what I am answering at this point.

Q You have probably answered it. Did anybody tell you that it was going to be 47 percent? I mean, did Gerry Cohen or somebody say 47 percent would be African American?

A Yes, we knew the racial composition of the district, [*114] yes.

Q And---

A (interposing) It was printed out on each plan along with all of the other demographic information.

Q And didn't you know very well as a direct inference from that that meant that it would be very strongly Democratic as well?

A I don't think you can just look at that by itself because you don't know what kind of district that you have. But I--it is hard for me to separate that from my knowledge of the election results of the district. We knew it would be a strong Democratic district, yes.

Q Well, what I am asking you basically is when you put 47 percent African American there, weren't you really just using race as a proxy for politics for your Democrats?

A We looked at election results is what we looked at. That was the primary tool that we used in drawing the 12th District. Yes, racial fairness played a part in it.

* * *

[*128] Q Has anybody anywhere ever advised you that functional compactness was a permissible redistricting principle?

Ms. Smiley: I am going to object to the extent that you asking him for any conversations with legal counsel. To the extent that you can answer---

A (interposing) I don't recall that. I think that is **[*129]** just a term that we were able to use to show that we considered many factors in drawing the plans.

Q In other words, you are not saying it is--you didn't originate the term? You weren't the first person that said---

A (interposing) I don't remember how it got started.

Q Okay.

A It sounded good; we started using it.

Q All right.

A I don't know coined it. I don't know.

Q And you are not aware---

A (interposing) I have no clue if it is in any case law or not. But I mean, we have talked about this, and there are many factors.

And this is not necessarily all-inclusive, but we talked about trying to keep as many counties whole as we could, trying not to split precincts when possible, trying to look at communities of interest, trying to make sure that we had a

partisan balance, to make sure that it was racially fair, to look at the incumbents and consider that because that was important in getting enough votes to get it past the General Assembly because of the influence that they had over the General Assembly. All of those things I think come into play. And there may be a few more that I have left out.

A I suppose there is no point in going back and asking **[*130]** you about community of interest which you used in your last answer. You have already talked about that earlier. Do you remember whether when the time came to prepare the Section 5 submission you had any involvement in that?

Ms. Smiley: For which plan, the 1997 plan?

Mr. Everett: Right.

A Do you mean submitting everything to the Justice Department---

By Mr. Everett:

Q (interposing) Right.

A ---for preclearance? Yes, I did have involvement.

Q What was your role and who else was involved in that?

A I talked to members of the Justice Department. That is about it. I mean, I talked to them.

Q Who actually submitted it, under what name, if you recall? Was that by the Justice Department, by you, or somebody else, if you recall?

A It was a combination of the Justice Department and the General Assembly staff putting things together and submitting it. I don't know under what name they put it under.

Q And in that context was it your belief that because the Section 5--because there was a majority black 1st District that

the Section 5 submission for preclearance would in fact be precleared?

A That was an important part of preclearance, but as I [*131] recall, the 12th had to be precleared, too. So I mean, I think both of them---

Q (interposing) The whole plan, didn't it?

A The whole plan had to be precleared, but they were looking at both of them.

Q And did you have any concern as to whether it would be precleared or any belief as to whether it would be precleared if the 12th District had a much lower percentage of African Americans?

Ms. Smiley: Object to the form if you are asking for a legal opinion.

A I did not have too much concern about it because we had a Supreme Court decision striking it down and I thought the Justice Department would take that into consideration when we submitted the plan. So I did not have a great deal of concern. You never know what the Justice Department is going to do and I really didn't know. But I was more concerned with correcting the constitutional defects.

* * *

[*132] Q Did you have any other election results you considered besides the three that you mentioned?

A Yes.

Q What were those results and how did you obtain them, from whom?

A I obtained them from an organization called the National Committee for an Effective Congress. They had some election results in the different districts from 1990 to I believe 1996. And we used those election results along with those election results that were already in the General Assembly computer.

Q Those results that you obtained from the NCEC were not put into the computer at any time?

A No, they were not.

Q It was not published in any way you were relying on them?

A It was their data that they were letting me look at.

Q Is that organization affiliated in any way, direct or indirect, with a political party?

A I don't know if they are affiliated, but they [*133] are--what they do is that they try to affect the process so that Democrats are elected to Congress. That is at least part of their mission.

Q Is any of their mission assuring that minority persons get to Congress?

A No. They started out telling me that, but they had no interest in that whatsoever.

Q So their mission was simply to give you results in that regard as to what the likely outcome would be?

(Witness nods affirmatively.)

Q When did you get those results from the National Center?

A When did I get them?

Q Uh-huh.

A At various times when I requested the information through the entire process.

Q Was it pretty clear to you from that information that an African American would be elected or reelected to Congress from the 12th District under the plan you drew?

A I didn't affect my opinion one way or the other. I felt that an African American would have a fair shot at being elected in the 12th.

* * *

[*138] Q Now, with respect to the 12th District, the six counties, all of which were split in the '97 plan, is it your testimony that could not reasonably be avoided consistent with other goals?

A That is correct, yes.

Q So that---

A (interposing) Other goals were more important than having whole counties in the 12th.

J. H. FROELICH DEPOSITION (EXCERPTS)

[*7] Q Have you always lived in North Carolina?

A I have always lived in North Carolina and always lived in High Point, North Carolina.

Q Could you tell me what your educational background is?

A I went to school in High Point, then to Woodbury Forest School in Orange, Virginia. And then I went to the University of North Carolina at Chapel Hill and then I was in the first MBA class in Chapel Hill, graduating in 1953.

Q All right. Where have you been employed, if you could briefly describe your employment---

A (interposing) I have been employed in---

Q ---background?

[*8] A I went to work when I got out of school for my father in the face veneer business and then took that business over upon his death in 1962 and then got into the import business bringing in products from southeast Asia and started two manufacturing plants that made drawer component parts for the furniture industry and brought in teak lumber and other things for--mahogany and other things for this region.

I got in the furniture business in the '70s and became--took over the old Tomlinson Furniture facility, which we turned into Market Square, which is the second largest--it and its sister buildings, the second largest group of market buildings in the High Point market. And we just recently sold that to a real estate investment trust. And I am involved in the motion picture production business and in the hotel business. We own this particular property right here.

Q It sounds pretty busy.

A Yes.
Q It must keep you pretty busy.
A Well, I am also president of AAA Carolinas and I am the vice chairman of the School of the Arts board and involved in a lot of other board activity.

* * *

[*13] A. I know Greg Everett.
Q. And Robinson Everett?
A. I know Robinson Everett.
Q. And Dorothy Bullock?
A. Dorothy Bullock, yes.
Q. You know her?
A. Uh-huh.
Q. How do you know Ms. Bullock and the Everetts?
A. I have been involved in the television business and have been in business--we have been in business together in the television business in Greensboro and also in Wilmington.
Q. You have been in business with Robinson Everett, would that be?
A. Yes; and his mother, who is deceased. And Dorothy Bullock is the lady in the office that I would--who would communicate with me.
Q. And is Greg Everett Robinson Everett's son?
(Witness nods affirmatively.)
Q. Have you had any business dealings with him or just know him as Robinson Everett's son?
A. I just know him as Robinson's son.

Q. When did you first become involved in business with Robinson Everett and Ms. Catherine Everett?
A. In the 70s.
Q. In the 1970s; okay.
[*14] A. Or really late '60s.
Q. Once you went to vote in 1992 and found out that you were in the 12th District, did you contact Robinson Everett about this lawsuit?
A. I think I was conscious of what was going on, and I may have mentioned to him that I was pleased that that was going on when I saw him under some--I didn't go vote and call Robinson, no.
Q Did you try to keep track of the *Shaw* lawsuit?
A I very much did.
Q And how did you keep track of it?
A In the press and finding out what is going on; I have been involved in politics in North Carolina all my adult life. I have been chairman of the Democratic Party in Guilford County. I ran Skipper Bowles' campaign for governor in 1972.

I have been involved very much in what goes on politically in North Carolina and how North Carolina is put together. So I very much agreed that a suit ought to be filed because I thought the congressional district was absolutely not justifiable at all.

Q Did you talk about it with Robinson Everett other times other than just mentioning to him that you agreed with the suit?
A Well, I am sure I had conversation with him, yes, [*15] ma'am. Yes. And I told him a number of things, which are in some of the affidavits, that after we had Mel Watt as the

congressman up here, Mel Watt didn't have a telephone number in our--there was no way to contact him locally.

He was in our town twice during the first year that he was--the first two years that he was in office, one of those at the Episcopal church and one at String and Splinter Club. String and Splinter happens to be located in his district. But he made no effort at all to be much conscious of High Point, and so that made me very, very concerned.

* * *

[*16] Q You are not aware that he had a full-time office in Greensboro?

A No.

Q You are not aware that he had a satellite office twice a month in High Point?

A No. When did that happen?

Q I can't testify.

A When did--when did he have a satellite office in High Point?

Q I can't testify. I will be glad to talk to you after the deposition.

Mr. McGee: She is going to have to ask you the [*17] questions.

The Witness: Okay.

Mr. McGee: We will find that out for you.

By Ms. Harrell:

Q You are not aware that he ever had any kind of office in High Point so far as you know; is that right?

A To the best of my knowledge, no.

Q And are you aware of trips he made in connection with the furniture market every year?

A No.

Q Are you aware of any other trips to High Point during the period that he represented---

A I mentioned to you two trips, one he took to talk to some businesspeople at the String and Splinter Club, which happened to be in his district---

Q (interposing) Yes, sir.

A ---and an event at the Episcopal church. I am not--and I have been very involved in the political world of this town and he has never contacted me once.

Q Have you made any efforts to contact him?

A I don't--I can't recall that there has been any--I think there probably were some specific events that I sent some information about, but---

Q Could you tell me what you mean by events that you sent information about?

[*18] A Well, things going on; I may have sent a letter to him or something, but I don't ever recall--I don't know that I did that, and I don't know that I ever got any--any correspondence from him.

Q To the best of your memory, have you ever contacted him and asked him to respond to a problem or specifically asked him to respond about an event that you thought he should attend or anything like that?

A I just--he was not here, not anywhere near here. I just wrote him off as representing us.

Q So if he would testify or a member of his staff would testify that he came to High Point on a number of occasions for

events connected with the furniture market, something connected with the housing authority, events connected with Martin Luther King Day and other events as well, you wouldn't be aware of them?

A No. And I am very much--in that period of time very much involved in the furniture industry and in the markets.

Q And of course High Point is not in his district now; is that right?

A Currently not.

Q So it wouldn't be surprising---

Mr. McGee: (interposing) By that do you mean in the 1998 plan?

Q I'm sorry. He is not in his district under the--it is [*19] not in his district under the 1998 plan?

A Right.

Q So if he had---

A (interposing) It was in the '97 plan, I believe, but it--that never was operable.

Q So if in connection with the implementation of the 1998 plan he closed any Guilford County offices, that wouldn't surprise you; right?

A Well, if he wasn't representing Guilford County, if he had offices to close, that would be something for him to do, but I am not familiar with where those might have been.

Q Did you say--I know you said so far as you knew there was no phone number in the High Point telephone book. Did you also say so far as you could tell there was no phone number in the Greensboro telephone book or did you check that?

A I did not check Greensboro to see if it was in there; no. I mean, our book has everything in the region, but no, not in the High Point.

* * *

[*22] Q. You were never a plaintiff in the *Shaw* case; right?

A. I wasn't a plaintiff in the *Shaw* case.

Q. Were you aware that the *Shaw* plaintiffs asked the court not to rule on the 1997 plan in that case?

A. Say again.

Q. Were you aware that the *Shaw* plaintiffs asked the court not to rule on the validity of 1997 plan in that case?

A. Yes.

Q. You were?

A. I think I was.

* * *

[*30] A. I mean, I was told what was going to happen and I agreed to that.

Q. You were told this is the way it would work; is that right?

A. The way it was going to--the way it was in the process of working, yes.

Q. How did it come about that you were going to become a plaintiff in this lawsuit?

A. Because I felt very strongly that something had to be done.

Q. All right. And had you previously told Robinson Everett that you would like to be a plaintiff or were willing to be a plaintiff?

A. Yes.

Q. Had you done that before you filed your declaration in the *Shaw* suit? Do you recall?

A. I don't remember that.

* * *

[*45] Q Have you contributed to any African American candidates' campaigns?

A Yes, uh-huh.

Q Who would that be?

A Let's see; I guess I have--the senator from Orange County.

Q Would that be Howard Lee?

A Howard Lee.

Q All right.

A Let's see. I guess Senator Martin in this county I sent some to.

Q State Senator Martin from Guilford County?

[*46] A Right. I contribute to the North Carolina Senate Campaign Committee, and so I do that that way and do a significant amount for that.

Q Was that what you meant when you said you contributed to Senator Lee and Senator Martin?

A No. I have done those---

Q (interposing) You have done those directly in addition to what you contribute to the general fund for Senate campaign?

A But particularly of late Senator Hagan.

Q And have you participated actively in the campaigns of candidates for Congress?

A Got involved in Rich Preyer's campaign. I have been involved in--oh, let's see who else. I have not been as active in congressional campaigns as I have in other campaigns.

Q Would it be fair to say, then, that you have not been as active--you have not been really active perhaps by your standards in congressional campaigns other than Rich Preyer's?

A No; I am always active in some campaign, but I have not been overly active in congressional campaigns.

Q Okay.

Mr. McGee: However defined.

Ms. Harrell: However defined.

* * *

[*47] Q All right. Let me rephrase that. I'm sorry. Could you explain a little bit more what you mean when you say what the fruit of the poisonous tree means?

A What they did is they came up with a deal that stretched a congressional district almost halfway across the state and going here, there and yon, particularly take [*48] racially--heavily racially represented areas to achieve a racial purpose. And that is poisonous. That isn't the way it is supposed to be set up. That isn't the way you are supposed to do it.

Q And you are talking about the 1992 plan here; right?

A Well, that is what the '92 plan did. That is what--that is what---

Q (interposing) Describe--I'm sorry. Go ahead.

A And that is what has been going on. That is what---

Q And the 1997 plan is a different plan, is it not?

A It is still doing the same--much the same thing.

Q But it is different; right?

A Yeah, it is different. It is not quite as bad, but it is still doing the same kind of stuff. If you put Mecklenburg County down here and its tentacles move on--way on up into the piedmont, that is--and do it the way that has been done, that is poisonous.

Q And so your view is that a plan that combines different--those areas is a poisonous--is necessarily poisonous; would that be fair to say?

A Yeah, I think it is, going about that way, trying to interconnect areas that are not interconnected any other way, trying to do it solely to accomplish a racial purpose.

* * *

[*52] Q And did you refer to having homogenous groups in a district? Didn't you use the word "homogenous"?

A I was saying like a district will have a number of homogenous problems. I mean, the problems in Mecklenburg County are somewhat similar to some problems in Guilford County, but there are also problems that aren't at all like Guilford is facing. In other words, there is a homogeneity of the population group here that has got a thrust that differs from what it is down in that part of the state.

Q So you are saying that there are some differences based on geography between residents of Guilford and residents of Mecklenburg in terms of their interest and concerns; is that right?

A Yeah; as you look at all manner of different issues.

Q And are there some differences based on citizens in terms of their concerns and interests based on whether they live in inner city areas or rural areas?

A There certainly are some issues that very much differ at the inner city or rural areas. But you put that balance-- they are there within the district, so you balance those issues out.

[*53] Q So some citizens in a rural area might not have the same concerns as a citizen in the--as citizens in the urban area even in the same county; is that a fair statement?

A Let me tell you my observation running a statewide gubernatorial campaign. We are five--basically five different states. The view varies and the interests around North Carolina vary in at least five different ways by area. That goes back to where it is and what they do and how they--and the things that are the issues that come up. And so in effect what is done by this is to put parts of two states together, if my five is working.

Q What are your five areas?

A Well, the five--western North Carolina is about two. You have got two in, say, eastern North Carolina, two in western North Carolina, and two in the central part of North Carolina, at least.

Q So are you saying that it is the equivalent of five states or are you saying there are actually five separate identifiable areas?

A It is very much like five states in their--if you go to western North Carolina, it is totally different than eastern North Carolina. Our part of the piedmont is significantly--it has got--Winston, Greensboro, High Point. It has got some significant differences to Mecklenburg and Gaston County and down that way.

[*54] Q And where do you put Wake and Durham?

A Well, Wake and Durham is different, too.

Q Would you consider the east all one or would you break that up?

A Well, the east is more like one because of its topography.

Q Because of what?

A Topography and so forth.

Q So you would say the concerns of the folks who are actually on the coast would be similar to the concerns of folks in Greenville and Rocky Mount?

A Yes.

Q And the folks up in Bertie County and down in Robeson?

A Yeah.

Q And would you say the concerns of the folks throughout the western part of the state would all be similar to each other?

A They have got some significant similarities, yes.

Q So the folks in---

A (interposing) You take Asheville west, and that group up in there has got--they have got a number of different issues and things that are different for them. You take the Boone area all back to the Virginia line and all up, that is another different kind of--set of things. So that is what happens.

[*55] Q And in your view people in the inner city in Greensboro have more in common with people in the rural areas of Guilford County than they would with the people in the inner city of Mecklenburg?

A I didn't say that.

Q Oh, I'm sorry.

A No, ma'am. I said they are part of this county. They are part of what is here. Now, they may have some similarity with a similar kind of group in Mecklenburg County, but that doesn't mean that those ought to all be interconnected.

Maybe I ought to be interconnected and you interconnected with everybody that is in one particular kind of level over seven or eight counties. That is just not the way it is supposed to be. You have got a group and you are representing the group within your district, not your district and another 120 miles away another district.

Q If you would, would you look at paragraph 25 of that complaint that I think we have agreed is Exhibit 46?

(Witness peruses document.)

A Okay. 25 you want me to read? I have.

Q Could you tell me what it means to you in that paragraph of the complaint to say that the 12th District in the 1997 plan does not conform to traditional redistricting principles?

A Because they took--they just interconnected minority [*56] groups all through the central part of the state. That is what they did.

Q And that is what you say is why it doesn't conform to traditional districting---

A (interposing) That is right. That is the poison tree to do that kind of stuff.

Q And now, you say it is the same thing in the 12th District in the '97 plan as the '92 plan?

(Witness nods affirmatively.)

Q And you don't have any question about its being contiguous, do you?

A Yes. I have got a real problem--well, it is contiguous. That is what they have done. But I mean, you get down to a teeny, teeny thread just to make it kind of work.

Q Well, what do you call a teeny thread?

A Well, probably one precinct through--one precinct line through a county.

* * *

[*76] Q How have your rights as a voter been abridged? Do you believe that your right as a voter has been abridged--your rights as a voter have been abridged?

A I think I have been put in--when it was the 12th District, I have been put into a district that doesn't fairly represent me and our region and I think my rights have not been properly looked after. I think it has been gerrymandered for a reason, a racial reason, and I don't think that ought to be happening in representation in this region right here.

Q You haven't been denied the right cast a ballot, have you?

A No.

Q And have you cast a ballot each time for Congress?

A Yes.

* * *

[*78] Q You yourself live in a very urban area, don't you?

A Do you mean where my residence is?

Q Yes, sir.

A We live in a high rise, triple mixed use condominium building, which is part showrooms, part offices, and 18 condominiums.

Q And you live in High Point?

A High Point.

Q Is that in the central area of High Point?

A Yes. It is the tallest--about the tallest building in High Point.

Q And if High Point is considered a city, you live in the center city; is that right?

A Right.

Q And so in the 12th District in the '92 and '97 plans, you are grouped with other urban residents?

A I am grouped in my precinct with mostly minority [*79] people.

Q And is---

A That is what my precinct is.

Q Right. I mean, your precinct happens to be more minority voters than---

A (interposing) Almost all---

Q ---white voters; is that right?

A Almost all minority.

Q And so you and the other members of your precinct all live in the city; is that right?

A Yes. Oh, yes. Yes, ma'am.

Q So you are grouped with people who live in the same area that you live in; is that right?

A Yes.

Q You weren't pulled in from an adjacent area---

A (interposing) No.

Q ---as a land bridge or whatever?

A No.

Q You are grouped with a group of people who live in the city; is that right?

Mr. McGee: Objection as to the form.

Q You are a resident of the inner city of High Point?

A Central.

Q Central city of High Point?

A Central city.

[*80] Q And you are grouped with people who live in the nearby area in the central city of High Point; is that right?

A Yes.

Q And when you say that most of the people who are in--from High Point who are in the 12th District are minority, you are living in an area which has more minority residents than white residents; is that right?

A Yes, ma'am.

[*64] Q Just in terms of how the computer operates, as you draw these maps on the computer, there is a screen of the [*65] map. I mean, on the screen there is a map; is that correct?

A That is right.

Q And it can be of a relatively small area, a district, or the whole state?

A Right.

Q And given the size of the screen if it is the whole state rather than a single district, it is a little bit harder to discern; would that be true?

A That is true.

Q How big is the screen, if you recall, approximately?

A I would guess it is about a 15 to 17 inch screen.

Q And all the screens were the same. You didn't have some computers with bigger screens, did you?

A Right.

Q Now, on that screen did you have to scroll in information or was it all there at the beginning--I mean, you just look up and there it is--as to percentages, let's say racial percentages?

A I think you would have to put in a formula to get the screen to actually display racial percentages. You could always put your mouse on a particular census block, precinct, possibly even county, click on it, and get information for that unit on population and racial breakdown.

Q Could you do it with respect to a district, click your mouse and get the percentage in a particular district, if you [*66] recall?

A I don't recall that you could do that. You would have to--my recollection is you would have to run a report to get that information for the district, although there was some cumulative information on the district on the side, as I recall, the side of the screen.

Q I see. The cumulative information, do you remember what that was? Was it--did it include race?

A To the best of my knowledge it did, although I don't recall whether it showed it as a percentage or an actual number or both.

Q And isn't it true that it did not to the best of your knowledge include the results of the three elections, the elections in 1988 and 1990?

A To the best of my recollection, that was also totaled cumulatively for the district.

Q All of that was there, to the best of your recollection?

A As I recall.

Q Now, with respect to the middle portion of the map in Exhibit 34, there is a line. And I don't know how to characterize it exactly. It seems to run from Mecklenburg County in a northeasterly direction. Can you tell us what relationship, if any, that might have to any particular congressional district?

[*67] (Witness peruses document.)

A It appears to be the 12th District.

Q And by the way, what appears to be the 1st District? Is that the northeasterly part of the state not touching the ocean? Is that the 1st District in this plan?

A I believe so, and I believe that the part touching the Atlantic is the 3rd.

Q With respect to the counties that are traversed by the 12th District in this plan, do you recall what those counties are and how many?

A It looks like Guilford, Forsyth, Iredell, Rowan, Cabarrus, and Mecklenburg.

Q So in that one Cabarrus is included?

A It appears to be.

* * *

[*71]Q If I ask you what is meant by the Greensboro black community, do you have any idea of what I would be talking about?

A I am not familiar with the Greensboro area, but I would assume those neighborhoods where there are higher concentrations of minorities, of blacks.

Q And by the same token, if I said the High Point black community you would have the same---

A (interposing) Right.

Q ---interpretation, or the Winston-Salem black community?

A Right.

Q Or the Charlotte black community?

(Witness nods affirmatively.)

Q Now, with respect to the 1997 plan that was ultimately adopted, isn't it true that it joined the Greensboro black community, the High Point black community, and the Winston-Salem black community at the north end and at the south end the Charlotte black community?

Mr. Stein: Objection.

A It does join what I would see as those communities. Whether it pulls them--the entire black community in, I don't [*72] know.

Q But a substantial amount of the black community in Greensboro? I am talking now about the 1997 plan.

A To my knowledge, yes.

Q A substantial percentage of the black community in High Point?

A To my knowledge, yes.

Q A substantial percentage of the Winston-Salem black community?

A To my knowledge, yes.

Q A substantial percentage of the Charlotte black community?

A To my knowledge, yes.

Q Now, earlier you used the term "land bridge." You used it; I didn't. Isn't it true that the 12th District as constituted in the map being shown here and the one that was enacted--isn't it true that that district as formed contains a land bridge connecting the Charlotte black community with the High Point black community and with the Winston-Salem black community and with the Greensboro black community?

A It is true---

Mr. Stein: (interposing) Objection.

A It is true that those are connected, but that doesn't fit my definition of a land bridge.

Q And is that because it is wider in the connecting area [*73] than your definition of a land bridge?

A It is--no, it is because the full precinct is used.

Q Now, if I told you that at least ten points that is only one precinct wide, would that in turn change as to whether it was a land bridge?

A Repeat that again; I'm sorry.

Q If I told that in at least ten places the 12th District as enacted was only one precinct wide, would that change your definition?

A No.

Ms. Harrell: Objection.

Mr. Stein: Objection.

Q So it would have to involve a splitting of at least one precinct or how many precincts before it became a land bridge?

A I don't know of a magic number that it would have to split. It is really more in the--if there is one split, it is more in the context of looking at why the particular precinct was split. If it was split solely to bridge two, I would say that would meet my definition of a narrow land bridge.

Q Do you mean if it were split solely to get from point A to point B?

A Right.

Q Now, in respect to the formation of a congressional [*74] district, if it were the intent of the persons who drafted a plan to join the Greensboro black establishment me--or pardon me, I'm sorry--the Greensboro black community, pardon me, the Winston-Salem black community, and the High Point black community on the one hand with the Charlotte black community on the other and if the only way to do it was by linking certain precincts, the only way to do it and maintain the one person one vote criteria, would you say then it was a land bridge?

Ms. Harrell: Objection.

A No.

Q So even if the only way to combine them was to route something in a particular way, that would not make it a land bridge in your view?

A Not alone.

* * *

[*75] Q (interposing) All right. Let me ask you another question. Do you know whether or not Precinct 77 in Charlotte was split so that the northern part of that precinct is in the 12th District and the southern part is in [*76] the 9th District?

A It is my recollection the precinct was split to keep District 9 contiguous.

Q Now, within your definition, isn't that a land bridge between the east and the west part of the 9th District?

Mr. Stein: Objection.

A That would be within--sorry; that would be within my definition.

Q So there is at least one land bridge that was drawn in creating the 12th District in order to maintain the contiguity of the 9th District; correct?

Mr. Stein: Objection.

A That would be my opinion.

* * *

[*112] Q Did Representative McMahan make any comments to you with respect to his perception as to the

12th District being proposed by Cooper after it had been drawn in a form containing parts of Charlotte, parts of Winston-Salem, parts of Greensboro, and parts of High Point? Did he talk to you about that particular plan, that configuration?

Ms. Harrell: Objection to the form of the question. If you can understand it, go ahead.

A Did he talk to me about the plan or that 12th District?

Q The 12th District is what I am focusing on.

A At some point he indicated that he felt that the portion of--I believe it was Winston-Salem that we had left out--he would go ahead and put that back in because it was part of the same urban areas as Greensboro and Charlotte.

Q Do you remember whether or not that was predominantly black, that area? You said he would take--you say he would put back in. Maybe I better start with another question. When you use the term "put back in," it implies that it was once in, taken out, and you are putting it back in. Had it [*113] been in before in some plan?

A I don't think it had been in the House plan that he worked on. It was obviously in one of Grady's plans and I think he had seen that, but I don't think he had proposed putting it in at that point. So instead of saying "put back in," I meant to say "put in."

Q Okay. I just wanted to make sure on that.

A Right.

Q Do you remember what precincts was contained there?

A I don't know.

Q Do you remember anything about the racial configuration of that area?

A Not offhand.

Q Did you ever discuss with him the circumstance that to a considerable extent Charlotte was split on racial lines?

Ms. Harrell: Object.

Q That is, that the number of predominantly black precincts placed in the 12th District from Winston-Salem--I should say Charlotte--from Charlotte was much greater than the number of such precincts placed in the 9th District?

Ms. Harrell: Objection to the form of the question; if you can understand it, Linwood, you can go ahead and answer.

A I don't recall having any discussion with him about what was inside and what was outside.

[*114] Q Nothing about who was in, who was out, African American or otherwise?

A I don't think we looked at that on a county basis. He would have been aware of the overall district's breakdown as far as racial percentage and as far as its elections and registration. But I don't recall us doing that for Mecklenburg County. Now, he did--and I don't recall--he did have some interest in certain precincts in Mecklenburg County that he was trying to keep in Sue Myrick's district, I believe.

Q How about with respect to--and were any of them predominantly black?

A To the best of my knowledge, they were not. The two that I can recall are in the northern part of Mecklenburg County, up at the neck of Mecklenburg County.

Q Was that what might be termed the 77 corridor up toward Statesville, or was that more on the 95--pardon me, 85 corridor going over toward Concord, or do you recall those precincts?

A I mean, I don't recall. They are precincts that stretch across from the east to the west side of Mecklenburg County up at the neck of Mecklenburg County.

Q They were from the east to the west?

A One precinct stretches all the way across, yeah.

* * *

[*118] A Yeah. I believe one of the precincts may be now in the enacted 9th District and one in the 12th. But I don't have a precincts map in front of me and I don't recall for certain what they were. I just know they were in north Mecklenburg.

Q With respect to any of the other counties besides Mecklenburg did you and Representative McMahan discuss the nature of the splitting insofar as it pertained to any racial concentrations?

A No; I don't recall discussing splitting as it relates to racial concentrations. We at some point early on took what the Senate had on District 12. And I do not know what discussions Representative McMahan had with Senator Cooper about that.

We did make some adjustments to that district but they were mostly to try and get Cleveland County whole because the Senate plan had split Cleveland County. So we had to make some adjustments in District 12 to get the population in District 9 worked out so that we no longer had Cleveland split.

Q So this discussion affected whether or not a portion of Cleveland County might be included in the 12th District?

[*119] A No; it was a discussion of splitting Cleveland between the 12th and the 10th--I mean, excuse me; the 9th and the 10th.

Q Oh, the 9th and the 10th, not---

A (interposing) And the House was trying to put it all in the 9th.

Q So there was no plan that you are aware of by anybody to put Cleveland--to try to extend the 12th District to include Cleveland County?

A No, no, no, no.

* * *

[*159] Q Now, with respect to urban setting, would it be your view that a white citizen living in Winston-Salem in the--well, the district other than the 12th District right across from a black citizen who is in the 12th District is also urban? Is there any difference in being urban based on race?

Ms. Harrell: Objection to the form of the question; if you can understand it, answer it.

[*160] A I don't understand.

Q Okay. In determining homogeneity as it relates to living in an urban setting, is there any difference between a white and a black living in the urban part, the center part, of Greensboro or Winston-Salem or any of these other cities?

Ms. Harrell: Objection; if you can answer it, go ahead.

A I wouldn't consider a black in one district and a white in another to be distinguished based on whether they were urban or not.

[*25] Q Now, look below there. "The population in 12 has homogeneous interests comprised of many citizens living in an urban setting." Do you remember any sort of comment by yourself to that effect?

A Again, I do recall that that was one of the factors **[*26]** that we considered was trying to put people of common interests together in a district, not just this district, but other districts.

Q But this is particularly with respect to District 12?

A Yes, it is.

Q And by homogeneous what do you mean?

A Just that they function together, they have common interests, they are, you know, basically urban livers, live in an urban setting is primarily what we were trying to--you know, what we were talking about.

Q Let me ask you this with respect to urban versus rural. Let's take a look at say Rowan County. Would you consider Rowan County urban or rural?

A Probably both.

Q And what do you mean by that?

A I would consider Salisbury to certainly have some urbanites living there. I certainly would consider there being some rural areas outside of Salisbury in that county.

Q How about Iredell County?

A Iredell, Statesville---

Q (interposing) Urban or rural? Same thing?

A ---Mooresville, you know, would be some of the--but not to the extent that Greensboro, Winston-Salem, High Point and Charlotte would be considered urban.

Q How about--you may not know these areas that well, but [*27] let me show you what purports to be the North Carolina congressional plan for 1997 now and ask you to refresh your recollection there.

A Yes, sir.

Q With respect to the southwestern corner of Forsyth County--I'm sorry; the southeastern corner, I beg your pardon--up there between High Point and Winston, would you say it is urban or rural?

Ms. Harrell: I am going to object. At least let the record reflect that you are showing him a map that has nothing but the names and boundaries of the counties and it has no indication of where any cities or highways or any other characteristics are. But to the extent you can answer that, Representative McMahan, please go ahead.

A Well, I do think that in Forsyth and Guilford the intent was to pick up basically Democratic voters in the urban areas. And so that is what this map--I assume those are two areas in those two counties that we did pick up.

Q Well, what I am trying to figure out is from your testimony how much of Forsyth is urban. Is it all urban or is part of that rural?

A Again, we are basically picking up Winston-Salem, the primary city of the county of Forsyth---

Q (interposing) And Winston-Salem---

A ---and also Greensboro in Guilford.

[*28] Q And so Greensboro and Winston-Salem would be urban?

A That is my opinion; yes, sir.

* * *

[*34] Q Now, to the best of your knowledge, with respect to Charlotte now, were all of those areas put into the 12th District in the plan in---

A (interposing) Judge Everett, I do not know. I did not look at specific precincts. Again, we went into Mecklenburg and modified it somewhat from what the old plan already included. But as I recall, we were not picking up [*35] minority voters in Mecklenburg. We were picking up more of the voters in the southern part of the county in order to balance the numbers out.

Q When you say balance the numbers out, what do you mean in that regard?

A To be able to get the 550,000 per district.

* * *

[*36] Q So your starting point basically was to change 12, which had been held unconstitutional?

A Yes, sir.

Q Now, there was a District 1 in the earlier plan, the 1992 plan, which is probably over here.

(Map shown to witness.)

Q Do you remember seeing that 1992 plan, looking at it?

A I believe that is it, sir. Yes, sir; it looks like it.

Q And that stretched almost from Virginia down to South Carolina?

A Yes, sir, it did.

Q And did you form any belief from the advice you received and otherwise whether that district as it existed in the 1992 plan was unconstitutional?

Ms. Harrell: I am going to object to the extent you are asking him for a legal conclusion.

Mr. Everett: I am asking him for his belief.

Ms. Harrell: Go ahead.

A I was not familiar at all with the process prior to being involved in '97. But yes, when I looked at that plan at that time and I looked at District 1 and District 12, District 12 had been declared unconstitutional. In my **[*37]** nonprofessional, nonlegal opinion, the way it was shaped in District 1 it could be also interpreted as being unconstitutional.

Q So then in your work as chair and work with Linwood Jones was the starting point to try to clean up--change District 12 and District 1? Was that sort of the---

A (interposing) Well, that and also to look at all the districts to see if we could reduce the number of counties that were divided, reduce the number of precincts that were divided, and make it a more compact plan across the state was our real--our goal. But yes, sir, District 12 and District 1 that were the two that seemed to be the most odd shaped got primary consideration.

Q So in a sense that was the starting point, and you had certain factors that you were considering?

A Again, looking at it in total context as I just explained it, again, they were certainly looked at and were a big part of the changes in the plan that governed the 97 plan.

Q What were the factors--you mentioned some reference to telling Linwood Jones of factors to look at. What were those factors that---

A (interposing) I think two or three of the primary factors--one was of course to try--we had to maintain the balance that existed, the six-six balance. That was first **[*38]** and foremost. Senator Cooper and I sat down early on and talked about a few of the things that we needed to have in order to get both sides to agree and one was to maintain a six-six balance.

We also wanted to try to make as geographically compact districts as possible dividing the fewest number of counties and no precincts if we could help it. We also wanted to try to put people of common interest together. We also looked at the--let's see; I am trying to think of other factors that were being considered.

Certainly in District 1, you know, the idea was to try to make it as compact as possible, but to try to also make sure that it was racially fair. And that would also apply to District 12. We did have, you know, the minorities in the House on both sides that we had to deal with and get everybody on board.

And a big consideration that we had to deal with, of course, was the fact that we had a Democratic Senate and a Republican House and to try to come up with a plan that both sides would agree on. It had to be fair to both sides, and then also to protect the incumbents. That was a huge--that is the one I was trying to remember. That was a huge consideration. And so it was a combination of all those things that were the instructions I gave Linwood to try and draw the map.

[*39] Q When you say racially fair, what do you mean?

A Just that minorities could have a chance to have fair representation.

Q Well, when you say fair representation, does that mean representation by people of their own race?

A Well, it could be both. I mean, obviously Democrats--it could be Democrats as well as people of their race is the way I would interpret it.

* * *

[*40] A Again, there were a lot of factors that had to be considered. In a nonprofessional, nonlegal way my understanding was that we--that District 1--that in order to get it precleared that we would probably need to have at least one majority minority district.

My understanding, again, was back in--at the time we drew the plan in '92 we were told we needed to have two minority majority districts and that was what really led to 12. That was my--again, just what I understood the process to be when we got started.

Consequently, we looked at 1, and race was a factor, because--not that it was necessarily the predominant factor, but it was a huge factor in 1, because it was my understanding we did still need to maintain one minority majority district.

Q So in other words—

A (interposing) And we could do that in the northeastern part of North Carolina very easily and make it a lot more compact. And then looking at the other district, of course, then it was to my judgment that it not necessarily [*41] did not need

to be majority minority, and that was not in any way the primary factor for 12.

Q So then was it your belief that if you had a plan that did not have a majority minority or majority black district in the northeastern part of the state, it would not receive preclearance and all effort would be wasted?

A We certainly--we understood we needed to get preclearance, and that was a factor certainly in getting that. Whether it would be totally denied, I did not know for sure until the Justice Department acted, but certainly felt that it would enhance the preclearance process if we had one minority majority district.

* * *

[*46] Q Now, there came a time when you-- well, let me first ask you another question. In some of your statements you have referred to racial fairness. What do you mean by racial fairness?

Ms. Harrell: I am going to object unless you want to put it in context.

Mr. Everett: Okay; sure.

By Mr. Everett:

Q Let's say, for example, in the floor debate on March 26 you speak of trying to agree upon a plan based on geographic compactness, racial fairness. What is racial fairness to you in that context? What do you mean?

[*47] A Well, again, that the members of the minority race would be adequately represented.

Q And in construing what is adequate representation, does that involve the race of the persons who are doing the--who are the representatives?

Ms. Harrell: Object to the form of the question. If you can understand and answer that question, go ahead.

A Certainly District 12, you know, was represented by a minority and he was an incumbent. And you know, that certainly was taken into consideration, that we did have an incumbent there.

And as I mentioned earlier, you know, obviously we had to deal with the minority members of the legislature and try to get all parties in the legislature on board and approve a new plan. You know, it was--you know, it was necessary to make sure that at least they were--could be fairly represented, you know, in the election process. So that is how I would answer that.

Q So at the time of the '97 plan there was an incumbent, Mr. Watt, Representative Watt?

A That is correct.

Q An African American?

A That is correct.

Q And basically if he were not protected so that he would be reelected, the members of the General Assembly who **[*48]** were African Americans would be upset; is that about right?

Ms. Harrell: Object to the form of the question.

A It was certainly a part of the discussion, one factor of many, many factors.

Q I mean, isn't it true--and you have only been involved in politics a short period of time, but isn't it true that in every

way it was represented to you that unless it was almost assured that Representative Watt would be reelected that there would be some real problems with the minority members?

Ms. Harrell: I am going to object to the form of the question. I am also going to object to the extent that when you say it was represented to him you are asking for confidential communications from legislators with any privilege or anybody who might have an attorney-client privilege. But otherwise if you can understand and answer the question---

A (interposing) Judge Everett, it was no different than all the other incumbents. You know, whether a minority or not, Republican, Democrat, in my opinion it was--you know, it was the same way. We certainly were--it was very important for us to get--in order to get the members of the legislature on board to protect the incumbents that did serve in the districts that our representatives served in.

* * *

[*78] Q Now, I am going to show you the same map, and I **[*79]** believe this is in gray, what purports to be the 1st District. And I am just going to ask you to look at it. Is it your testimony you think that is geographically compact?

A As compared to the '92 plan it is very geographically compact.

Q Now, if there had been no 1992 plan, would you say that it was geographically compact?

Ms. Harrell: Object to the form of the question; asking him to speculate. If you can answer it, go ahead.

A In my opinion, there are some other districts that do have the same geographical compactness that District 1 does, so yes, sir, I consider it to be a geographically compact plan.

* * *

[*93] Q With respect to preserving the cores of the prior districts, what did you mean there?

A We felt--we being Senator Cooper and I, the two chairs of the committees--that the best way to get a plan that both sides could agree on, one of the things we needed to do was to try to make the fewest number of changes in the plan as possible and obviously also for the purpose of trying to--the voters, in order to try not to disturb, you know, the voting public any more than we had to as far as them having to move to new districts or new precincts from what they have already been in.

So this was something that we decided in this plan that we would try to--you know, obviously protecting incumbents was a big part of it, as I said earlier in my testimony, and also to make the fewest number of changes in the new plan.

* * *

[*98] Q Did you go up to Washington?

A Yes, sir, I did.

Q And that was to meet with the Civil Rights Division people?

A It was at the Justice Department. I am not sure who was---

[*99] Q (interposing) Okay. Who went with you and when did that trip take place?

A. I do not recall when it took place. As I recall, there was a representative from--Eddie Speas was with us, I believe, from the Attorney General's Office, and Senator Cooper and myself. And it seems like there may have been one--maybe Leslie Winner. I am not sure if she was there or not. I think she might have been. That is all I--oh, and Linwood Jones; I'm sorry.

Q And how about Gerry Cohen?

A I do not remember.

Q And about when did that take place?

A I honestly don't remember the date.

Q It was after the plan was enacted?

A Yes, sir, it was.

Q And what did you all say to the folks up at Justice, whoever they were?

A The plan had been presented. They asked us questions about the plan.

Q And what were the questions they asked you?

A I don't recall specifically what the questions were.

Q Did any of the questions relate to race?

A As I--one question, I believe, or I know was the--I remember them asking me why did the majority of the blacks vote against the plan. And that was a question they asked me [*100] specifically.

Q And that was against the 1997 plan?

A Yes.

Q The majority of blacks where?

A In the House.

Q And what did you say in reply?

A I told them I was very surprised because I had worked with the minorities all the way through the process thinking that, you know, they were on board. And I really didn't know the answer to that other than they had a plan they preferred and they weren't--you know, they weren't totally satisfied with our plan and tried to offer an amendment for their own plan, but that is to the best of my recollection what I remember.

Q When you speak of working with the minorities, who are you referring to? I gather you were---

A (interposing) The minority members of the--primarily the minority members of the congressional redistricting committee.

Q Can you identify some of them by name, if you recall?

A It was just several of the members on the committee. I can identify, I believe, who actually were members of the committee: Representative Toby Fitch, Representative Michaux, I believe; he certainly had some comments about the plan. Representative Blue was part of the committee. Those **[*101]** are the three that I remember as---

Q (interposing) Representative Blue, who had been Speaker of the House when the---

A (interposing) Yes.

Q ---1992 plan was adopted?

A I don't know about that, but yeah, he was a former Speaker of the House.

Q And when you say you felt they were on board, why did you feel they were on board?

Ms. Harrell: Object to the extent that it calls for any statement made in an nonpublic forum by any of those House

members as they have not waived their legislative immunity. Otherwise, Representative McMahan, if you can answer the question, go ahead.

A I don't--you know, they were part of the committee. And as I recall, they probably voted for the plan in committee. I really don't remember, Judge Everett. I just felt like when it came out of committee that we had their support. And as it turned out, on the floor they decided to vote against it. That is about all I recall.

* * *

[*109] Q What state interest, if any, or governmental interest, if any, were there in drawing the 12th District as it was in the 1997 plan?

Ms. Harrell: Objection to the form of the **[*110]** question; but Representative McMahan, if you can answer, go ahead.

A Judge Everett, I don't recall as part of my deliberation that the state was really the big issue. It really was the issue of Senator Cooper and I trying to work together, because our leadership of both bodies wanted the legislature to do this in lieu of letting the court do it. And we were trying to make our best effort to develop a plan that we could get approved by the General Assembly. And that was the primary goal that we had and, you know, our plan was based on that.

Q You weren't trying to do it to avoid a lawsuit from somebody else?

A No, sir; not as I recall.

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DAVID PETERSON, PHD DEPOSITION (EXCERPTS)

[*4] Q Dr. Peterson, my name is Douglas Markham, and I am here today in association with Judge Robinson Everett, who represents a group of North Carolina citizens who are opposed to a set of congressional districts which in our view reflect a policy of segregation. Have you been retained as an expert in this case?

A I have.

Q And by whom?

A I have been retained by the State of North Carolina.

Q How are you being compensated?

A I send in bills monthly and I get paid in return.

Q And at what rate?

A My hourly rate is $335 an hour.

Q And is this your customary and usual rate that you charge for analysis or presenting testimony?

A Yes, it is.

* * *

[*8] Q Do you have a sense on how many occasions in your lifetime you have testified in deposition?

A Perhaps 40 times.

Q And how many occasions have you given testimony in court?

A Total?

Q Yes.

A Perhaps 35 or 40 times over the last 25 years.

Q Have any of those occasions involved redistricting?

A No.

Q Have any of those occasions involved segment analysis?
A No.

* * *

[*9] Q In what subject is your bachelor's of science degree?
A Electrical engineering.
Q And in what subject is your master's?
A Electrical engineering.
Q And your doctorate?
A Electrical engineering.
Q What is the training which qualifies you to conduct and offer opinions on segment analysis of the external boundaries of a congressional district?
A I am an applied mathematician.
Q How are you currently employed?
A I am currently retired from Duke University's statistics department, and I am president of PRI Associates, a statistical consulting and software development firm.

* * *

[*10] Q What is the purpose of this institute of which you are president?
A It is a statistical consulting and software development firm.
[*11] Q And what percentage of its activities are related to preparing to testify for trial and doing analyses related thereto?

A Slightly more than half.
Q And how long has that institute operated?
A It is not an institute. It is a corporation.
Q I'm sorry.
A A C corporation.
Q And how long has it been---
A (interposing) And it was incorporated in May of 1979.
Q When you were retained with respect to this case, by whom were you first consulted?
A My first contact was with Edwin Speas.
Q What was the nature of the assignment you were given?
A Mr. Speas asked me if there was any way that I thought one could address the issue of whether--whether one could address the issue statistically of whether race had been the predominant factor in the drawing of the boundaries of the 12th District.

Ms. Smiley: And we will object to any further questions that might ask Dr. Peterson to talk about conversations with Mr. Speas.
By Mr. Markham:
Q Were you asked in any way to prepare an analysis of whether race in fact was predominant in the construction of [*12] the congressional district?
A I don't understand the question.
Q Was your assignment limited to an analysis of the relationship of the external boundaries to the issue of whether race predominated or some other purpose predominated in the construction of the district?

A No. The question was is there some way of addressing the issue statistically of whether race was the predominant factor in the drawing of the boundaries of the 12th District.

Q In your mind is that question in any way different from whether race is predominant in the construction of the district?

A I am not sure. The way I prefer to phrase the question is whether race was the predominant consideration in the construction of the 12th District or the construction of the boundaries of the 12th District. I don't think it matters whether you use one phrasing or the other of the two which I have just given.

* * *

[*13] Q Is it your conclusion that party is a better explanation than race in the construction of the external boundaries of congressional districts of the 1997 plan or that it is essentially an equal explanation?

A My conclusion is that although there is a correlation between the racial composition of the populace and the boundaries of the 12th District, there is also a correlation between the political affiliation of the people in the 12th District and nearby and the boundary taken by the district and that of the two correlations the slightly stronger one is with political affiliation and not with race.

Q Is the degree of difference in the explanatory value of the data sufficient to permit you to say that one is a better fit than the other?

A Yes.

Q So these differences are in your view significant?

A I am not sure how you are using the term "significant." It is simply the case that one correlation is larger than the other.

Q Does your analysis provide an answer to the question [*14] of whether a significant number of persons are placed into or excluded from the district on the basis of race?

A It doesn't really address that issue, nor does it address the similarly phrased issue with respect to party affiliation. All it does is measure the correlation between race and the boundary and the correlation between party affiliation and the boundary and observe that of the two correlations that with party affiliation seems to be somewhat stronger than that with race.

Q Do you have any direct knowledge concerning the motivation of members of the legislature who shaped the plan?

A Not direct in the sense that I have spoken with any of the legislators.

Q And what is the source of your knowledge?

A What knowledge?

Q Did you have any indirect information respecting the motivations of legislators?

A I am told that the legislators, at least some of them, have said that in drawing the boundaries they considered party affiliation and not race. But I have not in any way relied on that information. My analysis is purely objective.

Q And have you been told what measure of party affiliation these legislators indicated was relied upon?

A I may have been told. I don't remember at the moment what I was told.

[*15] Q Have you reviewed any of the materials from the Section 5 submission of the North Carolina legislature to the Department of Justice?

A I am not familiar with that material by that name.

Q Have you reviewed any materials that are provided to the Justice Department in connection with seeking preclearance in a congressional districting plan?

A Not by that name.

Q Have you been provided any information that with respect to Congressional District 12 that someone moved the Greensboro black community into Congressional District 12 and then later removed 60,000 persons from the district?

A I am unaware of that.

Q And if you were aware of that information and assuming its accuracy, would that affect your analysis in any way?

A No.

Q Have you done or attempted any segment analysis similar to that reflected in the data before you using the boundaries of either the 1st or the 12th Congressional District from the 1992 congressional district plan?

A No.

Q So do you have any basis to offer an opinion in any way as to whether the external boundaries of the 1st or 12th Congressional Districts in that plan were predominantly racial or predominantly political in motivation?

[*16] A I have no opinion on that.

Q On how many other occasions have you performed some sort of segment analysis in your work?

A I have never done an analysis exactly like this, but it is rather common in my practice to start with a fact situation and tailor an analysis to that--to the question of interest in that fact situation. So the general approach is one that I have used lots of times. The specific result of that approach in this instance is unique.

* * *

[*16] Q Do you know whether segment analysis is a standard, recognized procedure in any scientific field?

A It is certainly common to identify atomic entities and examine them individually and then aggregate the results of those individual instances to see whether there is an overall statistical pattern. That is really the essence of statistical analysis. In this particular case the atomic pieces were segments of a boundary. I am unaware of anyone who has done exactly that kind of analysis in the past.

Q Have you used this sort of analysis, this atomic [*17] analysis, to offer an opinion respecting whether--the intent behind an action?

A I'm sorry; is the question complete?

Q Yes.

A I don't understand it.

Q Have you used this sort of atomic analysis using subparts of the data and then evaluating them in the method that you have described as a way of establishing the intent of some person or somebody?

A Only indirectly; in employment discrimination litigation it is fairly common to examine atomic circumstances in which

an employer made a decision and then to aggregate the results of those individual decisions to see whether there is a pattern of the employer in instance after instance making decisions which are adverse to the interest of some particular protected group from which one, typically not the statistician, but the trier of fact, may be inclined to infer intent.

Q Do any of your writings, either your newsletters or your academic writings, deal with some sort of segment analysis?

A They certainly deal with atomic analysis, but not specifically segment analysis. That is rather particular to the circumstances of this case.

* * *

[*18] Q Is it possible that this same sort of segment analysis would indicate a predominance of party over race even for a district which a court may have already invalidated under the conclusion that race was indeed the predominant factor?

A It could happen, yes.

Q Have you conducted any analysis concerning issues that relate to voter cohesion by race in North Carolina?

A No.

Q Have you conducted any analysis concerning polarization of voting by race within North Carolina or the absence of such polarization?

A Only to the extent that I have examined the correlation between race and affiliation with a Democratic party, but those results are reported in my two affidavits.

Q But with respect to voting behavior in terms of election contest results have you conducted any such analysis?

A I would just repeat my earlier answer in response to that. To the extent that I have, the results are reflected in my two affidavits.

Q And you are referring to the political party affiliation data as including the election contest results as well [*19] as the registration by race and other similar data?

A Yes. I have used four different measures of party affiliation and I have referred to them collectively.

Q Have you analyzed the question of whether or not Congressional District 12 as drawn in 1997 maximized Democratic strength within any particular region of North Carolina?

A No.

Q Did you conduct any analyses or begin any analyses which are not included in your report or reflected in its results?

A On that issue?

Q No; on any issue that relates to redistricting in this *Cromartie* assignment.

(Pause.)

A Not that I can recall; this was our study.

Q So there is no instance in when you began a process and found it wasn't fruitful or properly illustrative and just dropped that analysis?

A No; we don't do that.

Q And other than the segment analysis, is there anything else you relied on in reaching your conclusions?

A No.

Q How large a difference in values is necessary, for example, with respect to partisan affiliation before you

[*20] consider that difference important enough to be helpful in this analysis?

A I am not sure I understand your use of the term "helpful." All I did was to develop a measure of correlation between where the boundary of the 12th District runs and the racial makeup of the populace and then apply that same measure to the political affiliation of the same populace and note which of the two correlations tended to be stronger.

* * *

[*38] Q And you indicated earlier that third party candidates, it was your understanding, were discarded in the analysis and the data was just removed?

A We discarded them.

Q Okay.

A So that anytime we report a precinct as being say 40 percent Republican, it is a fair inference that by that same measure it is 60 percent Democratic.

Q And you would have done that both respect to party registration data and with respect to election contest data?

A Yes.

Q If there are mistakes in the accuracy of the data, could that affect the degree of difference of th ltimate conclusions of your analysis?

A It could, yes.

Q Could it affect whether there is a difference?

[*39] A It could, yes.

Q And it could therefore affect the direction of the difference?

A Yes, it could.

Q Did you or anyone in your organization make any effort to verify the accuracy of the data?

A No, not beyond making sure that we had read it correctly.

* * *

[*39] Q (interposing) Well, let me rephrase my question. With respect to the population data, total population and voting age population per precinct, do you know whether or not the State of North Carolina modified data from the U. S. [*40] Census Bureau in preparing the data which they provided to you in Exhibits 21 and 22?

A I don't know.

Q And if that data were modified in error, could that affect the accuracy of your results?

A It could, although if the data are erroneous and the data are in fact what the legislature relied on in making its decision, it might be that even erroneous data would not affect the conclusion that I draw.

Q I would like to draw your attention to observation 198, which I believe is in Exhibit 22. I believe that is reflected on page 47 in the upper right-hand corner; is that correct?

A Yes.

Q Can you tell me how many black registered voters in observation 198, segment 199, are shown for the external precinct, the outside precinct?

(Witness peruses document.)

A My copy is a little hard to read, but it looks like it might be 93, but it might be 90 or it might be 98.

Q And how many black persons in total are there for that observation?

(Witness peruses document.)

A It looks like there are 60 recorded here.

Q So a precinct with 60 black persons generates a black [*41] registered voter population of 90 or greater?

A That is what it looks like, yes.

* * *

[*42] Q I'm sorry; can we focus on the internal precinct?

A Okay.

(Witness peruses document.)

Yes. In the internal precinct the data show 44--no, sorry; the data show 61 blacks in total but 132 registered black voters in lines 149 and in line 150 as well.

Q And the number you began to give, the 44 number, would be the number of adult blacks who reside in that precinct according to the data.

A Yes.

Q Is that correct?

A That is right.

Q In Exhibit 21 is there a listing of precincts for which you lacked full data?

(Witness peruses document.)

Q Sir, can I draw your attention to page 7?

[*43] A Yes.

Q Were you aware at the time you prepared your analysis that you were missing full data with respect to these observations, these five observations?

A Yes.

Q What effort, if any, did you make to obtain complete data?

A I don't recall whether we specifically asked about these data or not. We had several conversations with the people who supplied us with the data. But my understanding is that we have all of the data that are available.

* * *

[*44] Q Do you know whether the--in your footnote--let me just start a different way. In your footnote in your first affidavit---

Ms. Smiley: What exhibit number is that?

[*45] Mr. Markham: That is Exhibit Number 19, page 3, footnote 1.

By Mr. Markham:

Q You make a mention of some special circumstances which relate to Davie County?

A Yes.

Q Can you explain to us what those circumstances are?

A I am not sure what there is to say beyond what is said in the footnote.

Q Did you make any effort to obtain data that was missing from the State with respect to Davie County?

A No. We just used minor civil division data.

Q Do you know whether the minor civil division data corresponds to the precincts for that county?

A As I sit here, I don't.

Q Did you calculate the data for Davie County with respect to election results or were these figures that were supplied to you by the State?

A All of the figures were supplied to us by the State.

Q Can you identify which of the data contained in Exhibits 21 or 22 relate to Davie County?

A No.

Q Assume with me that evidence will show that observation 199 will be among those observations which relate to Davie County.

[*46] A All right.

Q What is the percentage of support for the Democratic candidate for the U. S. Senate in 1990 in that precinct?

A Are we talking about an internal precinct or an external precinct?

Q The external precinct.

(Witness peruses document.)

A The question again was?

Q What was the level of support for the Democratic candidate for the United States Senate in the precinct reflected as the outside precinct in segment 199--I'm sorry; segment 200, observation 199.

A It looks as though 30 percent of the voters in that precinct voted for the Democratic candidate.

Q Looking at the next observation---

A (interposing) Yes.

Q ---can you confirm that that involves a different external precinct from the same county, and can you tell us what the results were for the Democratic senate race in that precinct?

A That does have a different precinct identifier. And the fraction is once again 30 percent.

Q And continuing to the next page, I believe the next identifying--the next new identifier for an external precinct will be in the fourth line, observation 204?

[*47] A Yes.

Q Can you tell us what the Democratic percentage was for the Democratic candidate--I'm sorry, what the percentage was of support for the Democratic candidate in that precinct according to observation 209 for another precinct in that county?

A Observation 204?

Q Yes. I'm sorry; yes, 204.

A 30 percent.

Q And continuing to the next page, what is the next unique precinct on the outside? Is that at observation 208?

A Yes.

Q Can you tell me what the Democrat support was for the United States Senate in that precinct in the same county?

A Also 30 percent.

Q And the next observation, 209, does that also reflect a unique precinct within the same county?

A Yes.

Q And what is the Democrat support?

A Also 30 percent.

Q As a statistician would it surprise you that every precinct in the county voted in the same proportion in the United States senate contest?

A It would surprise me if they had all voted in exactly the same proportion, yes.

[*48] Q And if those data are incorrect could they affect the accuracy of your analysis?

A Yes, they could.

Q In fact, were precincts bordering Davie County among those which you used in calculating whether or not race or party were a better explainer--a better method of explaining the external boundaries of the district?

Q Yes.

Q There are more segments than precincts that comprise your analysis; is that correct?

A Yes.

Q Is that a form of double counting?

A No.

Q Are all convergent segments equally probative of each of the two theories, whether race or party predominated in the construction of the external boundary of the district?

A I treated them as equally probative.

Q Would it be possible that because of differences--that convergent segments could be used to support one or the other theory of the construction of the external boundary of the district because of differences in the level of change with respect to party or with respect to race?

A One could devise other measures that take into account the magnitudes of the differences across boundaries, yes.

Q And did you make any effort to conduct such an [*49] analysis?

A No.

Q Do you have any sense for what that analysis would show without conducting it?

A No.

Q Did you consider conducting such an analysis?

A Briefly, yes.

Q Did you make some initial attempts to evaluate data with respect to such an analysis?

A No.

Q I had an unrelated question on Exhibit 21, page 5, in the upper right-hand corner. These are 24 observations from data set NC.PRECINCT. Can you tell me what that analysis began to show, what the purpose of this activity was?

A What this program does is to combine information from two files. The first few records of one of the files is--are listed on page 5. And a short time ago we looked at the records that are listed on page 2. Those are the top few records from the other file on which this analysis is based.

And what the analysis--or what the computer program does is to combine these two files together to produce the single file that runs for many, many pages and contains the results of our calculations.

Q I wanted to draw your attention to the fourth row across of data, the fourth grouping of rows, where county [*50] names are listed, Beaufort and Bertie.

A Yes.

Q Are those the very first that exist in the file and is that the reason they are included at this location, or is there some

other purpose or reason why those two counties were included in these data?

A This is just the top of the file called NC.PRECINCT.

Q Do you have any information concerning in which congressional district those two counties are located?

A Not at the moment, no.

Q Does your analysis treat away all precinct comparisons as equivalent regardless of their respective populations? For purposes of proving or disproving theory, does each precinct segment count the same regardless of what the population is inside or outside the district?

A When you say what the population is, you are referring to the number of people as opposed to their---

Q (interposing) The total---

A ---either political composition or their racial composition?

Q That is right, their total number.

A The total number? Yes, the count is independent--or the correlation measure that I use is independent of the total number of people involved in each precinct.

Q In evaluating intent would there not be a need to [*51] weigh the segment analysis according to populations in order to determine intent in constructing a congressional district?

A I wouldn't think that there would be a need to do it. One could do it, but it is not necessary.

Q So this was not an approach you have attempted?

A That is correct. I did not attempt it.

Q And so each segment counts the same even if the two precincts involved are relatively small in population and have

relatively little effect on the overall character of the congressional district?

A That is correct.

Q And does this analysis count each precinct equally either in support or in opposition to the theory even if the differences are very small or even trivial?

A Well, I don't know about trivial, but all it does is to count up differences.

* * *

[*59] Q I want to turn your attention back to Exhibit 22 to observation number 160.

(Witness peruses document.)

A Page 39.

Q In looking at Exhibit 23, this is one of the observations that is used to support the Type P divergent segment analysis; is that correct?

(Witness peruses documents.)

A Yes.

Q And assuming that the evidence will show those identifiers to be High Point Precinct 1 on the inside included in Congressional District 12 and High Point Precinct 4 externally, which is excluded and not--or not included in Congressional District 12, can you tell me how many black registered voters there are in the 1st Precinct inside the district and what total number?

A Internally there are four registered blacks out of a total of 1,212.

Q And what about the external precinct not included?

(Witness peruses document.)

[*60] A And outside it is seven blacks registered out of 2,114.

Q And this is evidence that there is a higher proportion of black persons outside the district than inside the district for that segment?

A Yes, if you calculate the two percentages and compare them, one number is greater than the other.

Q And is that a significant difference in your view?

A Again, when I use the term "significant" it is within the context of a probability model. And I don't see what probability model would be applicable under these circumstances, so I don't use the term "significant" here.

Q So is this evidence that the designers of the district in determining which precincts to include or exclude along the external boundary as it wanders through High Point chose High Point Precinct 1 on the inside and excluded High Point Precinct 4 on the outside despite the fact that High Point 4 was a blacker precinct?

A What it is is an element in the correlation of the boundary line with the racial makeup of the precincts which it separates.

Q I want to look at observation number 6, which I believe will appear on page 9 of Exhibit 21.

(Witness peruses documents.)

Q Have you located that?

[*61] A Yes.

Q And can you tell me again for that precinct how many black persons are in the precinct outside the district and how many black persons are in the precinct inside the district?

A In the total population?

Q Among the registered voters, black registered voters.

(Witness peruses document.)

A Outside there are 305 black registered voters and inside there are 338 black registered voters.

Q What is the total number of registered voters inside the precinct?

A The total number of registered voters inside the precinct is 2,278.

Q And for the external precinct?

A The total number of registered voters is 2,005.

Q Now, again, is this evidence significant or important to support a hypothesis that the designers of the district were looking at party rather than race and determining to select the internal precinct and to exclude the external one in this instance?

A It is an element of evidence of that, yes.

Q Is it trivial evidence?

A That is your word, not mine.

Q Is it significant evidence?

[*62] A Again, I don't know what significance means in this context.

Q Would it surprise you that there are a number of other observations with very small differences in the number of black persons or in number and support for or registration as a Democrat for a number of these precincts that your analysis is based upon?

A I am sure there are small differences that go both ways.

Q And have you made any evaluation of those, the numbers and types of--let me back up. Have you made any

evaluation of thresholds beyond which there are larger differences or smaller differences and relate them to these 25 precincts said to be supportive of the party analysis and these 16 precincts said to be supportive of a race analysis?

A No.

Q Now, does your analysis take into account whether inclusion of the external precinct touching the boundary of the 12th Congressional District would require the creators to split open another county which at the moment in the process of developing this plan is wholly contained elsewhere?

A I don't understand the question.

Q Does it matter to you whether parts of the segment of this district lie along county boundaries for counties which are not included otherwise in the congressional district?

[*63] A No.

Q So you give the same weight and force to the failure of the legislature to break across a county line to take out a single precinct of a county and include it than if they are making adjustments within counties that are already in part included in the district?

A Right. It is important to note that what I am doing is measuring a correlation, not doing a decision analysis.

Q Do you have any information concerning how many of these, the 26 Type P comparisons or the 16 Type R comparisons, involve counties other than the six that are in the 1997 plan included in part in Congressional District 12?

A I'm sorry; I didn't understand the question.

Q Do you know how many of these data set--these data examples, the 25 Type P divergent and the 16 Type R

divergent, involve counties external to the six counties which comprise in part Congressional District 12?

A I think the answer is no, but I still don't understand the question.

Q Well, let me step back. Do you know the six counties that are included in the 12th Congressional District in 1997?

A Not offhand, no.

Q Okay. And do you know how many of the external precincts that are compared to precincts within the 12th Congressional District would be in counties that are not at [*64] present included in the 12th Congressional District at all?

A I don't know.

Q And again, in your view every segment counts equally in the analysis regardless of whether that is maybe a factor in the decision maker's mind?

A Right; this is a correlative study.

Q Do you know, for example, whether Davie County is a county that is included in the 12th Congressional District in any part at the present time?

A I don't recall at the moment.

* * *

[*71] Q Does it matter to your analysis whether those precincts which tend to support the party explanation for external precinct selection or the racial theory for their selection--whether they are in the urban counties at the extreme of the district or whether they are in the counties that make up the bridge or connection between those counties?

Ms. Smiley: Object to the form of the question; answer it, David. Go ahead.

A Could you give me the early part of the question again, please?

Q Does it matter to your analysis whether the precincts which are a Type P divergent or Type R divergent are located in the large urban counties of Mecklenburg, Forsyth, and Guilford or whether they are located in the connecting counties of Iredell, Rowan, and Davidson?

A It does not affect my calculation.

Q Have you ever performed any analysis to determine how many of those precincts upon which your analysis relies fall in one type of county as opposed to another?

A No.

Mr. Markham: Let me mark as Exhibit 25 a summary of the divergent precincts.

[*72] (Exhibit 25 was marked for identification.)

Q Assume with me that population data elsewhere in this case will establish the percentage of black population in the 12th Congressional District in the 1997 version from each of the counties. Does it matter to your analysis whether the Type P segments or for that matter the Type R segments occur in a county that provides a plurality of the black population for the district or whether it occurs in counties that provide less than 5 percent?

A The initial part of the question again was does it matter to the analysis?

Q Yes.

A No, it doesn't.

Q Do you know how many precincts in total are responsible for the 25 segments which are Type P and the 16 segments which are Type R?

A No.

Q Do you know what portion of the entire number of precincts or of the population of the district those precincts comprise?

A No.

Q And again, that has no effect on your analysis?

A That is correct.

Q Is it your view that because the partisan level of the [*73] district is in the 60 percentiles and the race level of the district is in the 40 percentiles for African American under several different measures that the designers must have been concerned more about party than by race? Was that the conclusion that you reached in your affidavit?

A Well, we can read the affidavit.

Ms. Smiley: Which affidavit are you referring to?

(Counsel peruses documents.)

Mr. Markham: I am interested in the---

Ms. Smiley: (interposing) Are you referring to Exhibit 19?

By Mr. Markham:

Q Yeah. I am referring to page 8 of Exhibit 19 and the analysis before that time. Is it the fact that partisan levels of support are higher than black population levels that in your view somehow lend support to a view that the designers were more concerned about party than about race, or am I misreading your analysis there?

A Well, the conclusion that I state is that these figures support the position that creation of a Democratic majority in District 12 is a more important consideration in its construction than was the creation of a black majority. The assertion there I think is based on the fairly obvious point that blacks in fact are not a majority in the 12th District, but Democrats are.

* * *

[*80] Q And is the same true for the four measures of party support? Did you make any effort to evaluate which of those is more likely to be a predictor of partisan behavior than another?

A I did do something there, although in the final analysis I treated all four equally. But I think that of the four voter registration is probably the least reliable indicator of voting behavior.

Q And yet if I understand correctly, the data which you provided which shows the greatest difference or support for the party thesis over the race thesis is in fact the voter [*81] registration data?

A I don't remember if that is the case or not. It may be.

Q Well, I will draw your attention to paragraph 18 of your Exhibit 19. And can you confirm that in fact it was the voter registration data upon which you base this portion of your analysis?

A Well, paragraph 18 does describe an analysis that is based on voter registration; that is correct. Paragraph 19 reports the results of all of the other analyses.

Q And are those results of the other analyses also reported in Exhibit 21 in summary fashion? And if so, can you tell us which pages?

A Yes.

(Witness peruses documents.)

The results are reported starting on page 35 through page 40.

Mr. Markham: Next we will mark Exhibit 27.

(Exhibit 27 was marked for identification.)

Q Can you confirm that this is an accurate summary of the race and party divergent segments on the various measures that you employed?

(Witness peruses documents.)

A Yes, it is.

[*82] Q Just so I am clear, as an example, if one were constructing the district based on the results in the lieutenant governor's race, the analysis would show that race was a better predictor than party for the external segments of the district 22 occasions to 19; is that correct?

A Yes.

Q And comparing to the voting age population data, if one were constructing a district using the political results of the lieutenant governor's race in 1988, race would be a better predictor than party for the external segments of this district 22 occasions compared to 17 occasions?

A Yes.

Q And similarly if you are looking at voter registration, 20 to 18?

(Witness peruses documents.)

A Yes, I believe that is correct.

Q And in fact the analysis that you reported in your affidavit is a comparison of Democrat voter registration to racial registration, which is the last column in the bottom row; is that correct?

A The one that is described in paragraph 18?

Q Yes.

A Yes, I believe that is the case.

Q And that is the instance out of these 12 comparisons in which party most exceeded race; is that correct?

[*83] (Witness peruses documents.)

A Yes.

Q And if registration is less reliable, is it less reliable both with respect to Democratic registration and with respect to African American registration?

A I doubt it. I don't know what the reason for that would be.

Q But if we discounted those analyses which include registration as a component, then the analyses which would be relevant to this inquiry would be the six analyses on the top two rows for the first three columns for lieutenant governor, Court of Appeals, and U. S. Senate; is that correct?

A If for some reason we were to discount registration entirely, you are right, although I can't think why we would do that.

* * *

[*84] Q If that single precinct were needed to provide contiguity to the district---

[*85] A (interposing) Right.

Q ---that element of the analysis wouldn't factor into your mathematical analysis, but in fact that segment along that precinct is proof that party drove the external boundary location at that location of the district?

Mr. Stein: Objection.

Ms. Smiley: Objection to form.

A The boundary of the segment would be included in my calculation and it would be an element in the calculation of the correlation or the degree of association between the 12th District boundary and the characteristics of the party affiliations on the one hand or the racial identities on the other of people living on either side of the boundary. So it would figure into the calculation.

Q But your analysis would not take into account the possible individual idiosyncratic explanations for any one precinct's presence or exclusion in a district based on geography, for example?

A That is true. It simply accepts the boundary as it was drawn and asks does this boundary function better to separate--does this boundary function better to fence in Democrats or does it function better to fence in blacks.

Q And for example, in your Exhibit 20, the map of Iredell County where---

(Counsel peruses document.)

[*86] Let me scratch that. For example, if inclusion of a precinct would result in some distortion of the geographic shape, that would not factor into your analysis in any way?

Mr. Stein: Objection; asked and answered.

A The analysis depends upon the boundaries that are involved in the 12th District and the nature of the people on

either side of the boundary, immediately on either side of the boundary. And it measures the degree of correlation between the path taken by the boundary and the racial composition of people living on either side of the boundary and the political affiliation of the people living on either side of the boundary.

Q And if in fact you included a precinct which had previously been excluded, your analysis doesn't review where it would be necessary to remove a precinct of equivalent population in order to achieve population equality, for example?

A No.

Q And you don't swap or compare groups of precincts of equivalent populations, do you?

A I certainly don't.

Q And the segment analysis--in an instance where the district is one precinct wide, the segment analysis assumes that you could add the external precinct and exclude the internal precinct, or does it?

[*87] A No, it makes no such assumption.

Q And it makes no comparison of what the effect on the district would be to have both the internal and the adjacent external precinct compared to just the internal precinct?

A That is correct. It doesn't do that either.

Q So in the construction of a district are decision makers able to decide to include or exclude a district based on a difference in race or party as the model analyzes?

Mr. Stein: Objection.

A I don't understand the question.

Q Does the analysis that you have conducted take into account whether a decision maker in fact could include the

external precinct and exclude the internal one consistent with, for example, contiguity or equal population or any other interest?

Mr. Stein: Objection; asked and answered.

A What the analysis does is to measure the correlation between an existing line. It doesn't consider other lines. It considers just the existing line. It says what is the correlation between this and race, what is the correlation between this and political affiliation.

Q And when you said your analysis is not a decision making analysis, you meant by that that your analysis doesn't determine whether at that stage of drawing the boundary any decision maker would or could make that kind of comparison?

[*88] A What the analysis doesn't do is to ask what other correlations might be achieved by drawing the lines elsewhere.

Q Do you have any personal knowledge of the neighborhoods of the 12th Congressional District or the counties that comprise it? Have you done any--as a part of your analysis have you made any investigation?

A Only to the extent that I have driven through them on occasion, but not for any purpose connected with this litigation.

* * *

[*98] Q In the analysis that you have performed respecting the selection of grand jury foremen, members of the grand jury, has one of the issues in the analysis been whether race was a motive in that selection process?

A That has been the issue, yes.

Q And is the same true in your employment discrimination activities in preparation for testimony in those cases?

A In some of them, yes.

[*99] Q And have you both testified that race was a motive in employment decisions and was not a motive? Have you both---

A (interposing) Usually---

Q You have reached that analysis?

A Usually statistical analysis can't reach the ultimate issue. The only thing statistical analysis can do is to say here is evidence in favor of this or here is evidence in favor of that. But it doesn't ever get to the bottom line that says race was a factor or race was not a factor any more than I can do party affiliation was the factor or not the factor.

But to get back to what I think is the spirit of your question, have I worked both for plaintiffs and for defendants--not on the same case, of course--the answer is yes, sometimes I have supported plaintiff's position, and yes, sometimes I have supported defendant's position. I have also had clients that I have had to tell that I was sorry that I couldn't support their position, both plaintiff and defendant.

[*33] Q Well, as a social--I realize that you are not a lawyer, but you are a political scientist dealing in the redistricting area. Would it be your view that a state law which forbids the cutting of a county line would outweigh or [*34] override the Voting Rights Act, Section 2 of the Voting Rights Act?

Mr. Markham: Objection. He is not an attorney.

Q As a political scientist, you have discussed this issue and you said you had given advice. I am not asking---

A (interposing) Yeah.

Q ---for your legal opinion.

A Yeah. It now turns out because of--because of *Miller v. Johnson* to be one of the race neutral criteria, you know, to minimize the splitting of counties. And even at that time I had the sense that that was where the courts were ultimately going to go as they were going to pay some attention to county lines. And Michigan had a tradition of--in the state legislature, now, of paying a tremendous amount of attention to county lines.

Q So as a political scientist, you do believe that county lines override Section 2 of the Voting Rights Act?

Mr. Markham: Objection to form; calls for legal conclusion.

Q As a political scientist.

A I think these are factors that the court would have to take into account, and the question about whether or not there is a violation of Section 2 would depend more upon the numerosity and concentration of the minority group, you know,

the cohesiveness of the minority group, and of course the [*35] third element, the cohesion of the white voters.

Q And if that exists, as a political scientist do you believe that a county line can be preserved and you could ignore a concentration of cohesive African Americans?

A You could then cross the county line in order to create a district; yes.

Q And in fact have you--in any of the cases where you have been involved in Section 2, have you ever had to give advice to a governmental entity that it needed to cut county lines or other political subdivisions in order to create a Section 2 district, or has that just never been part of what you have to do in a Section 2 case?

A I have had to evaluate proposals that did that.

Q Section 2?

A Yeah; proposals by the plaintiffs typically to do that, and so that--I have had to take that into consideration.

Q And on occasion have you had to give your governmental client an opinion that in fact they might have to split some jurisdictional boundary or governmental boundary?

Mr. Markham: Again, objection as it calls for a legal conclusion.

Ms. Smiley: No, I am asking him a fact question.

By Ms. Smiley:

Q Have you on occasion so advised a governmental entity?

[*36] A Yeah. I think back in--way back in the early *Clark v. Edwards* case where we had multiparish judicial districts and where, you know, the evidence suggested that there was a sufficiently large and geographically concentrated

African American population and there was other elements to the proof, ultimately the districts that I drew crossed some parish boundaries.

* * *

[*36] Q And who did you--who were you retained by in those [*37] cases?

A Plaintiffs in *Hays*, plaintiffs in *Johnson*, and plaintiffs in *Shaw*.

Q And were the plaintiffs white plaintiffs in those three cases?

A In *Hays* they were mixed, two white, one African American and one Asian American. *Johnson*, I don't remember all of the plaintiffs. I do remember Davida Johnson, the first named plaintiff, is white. And as I recall, I believe the plaintiffs in *Shaw* were white--are white.

* * *

[*63] Q *Moon v. Meadows*?

A *Shaw* case.

Q And what kind of analysis did you offer--excuse me. Did you represent the plaintiffs suing the government?

A Yes, Donald Moon and his coplaintiff.

Q And were they minorities?

A One was white and one was African American.

* * *

[*69] Q And I believe in that declaration you addressed that question looking at county splits and town splits; is that correct?

A County and municipality splits; yes. I did not have time to do the precinct splits at that point. There were only two precincts in that geography. There are more precincts in today's world that are split than those two.

* * *

[*70] Q Did you consider any other hypothesis aside from race as a predominant factor?

A No. I have always found race to be the most powerful explanation for bizarre districts.

Q Then you don't look at any other alternative?

A I consider other alternatives to the extent that the defendants offer alternative explanations.

Q In your '98 declaration, did you consider--when you did your work at that time, did you consider any other alternative explanations?

A I read the Peterson affidavit. I didn't know what to make of it. I was really under incredible time pressure. I finally said to Mr. McGee--I said, "I can't really relate very well in my declaration at that time to this Peterson analysis," because it was a nonstandard analysis. It wasn't an analysis that political scientists typically do.

[*71] Q It was one you were not familiar with?

A I was not familiar with it at that time; yes.

Q Well, you knew there was an alternative hypothesis?

A From Peterson's report I knew there was an alternative hypothesis.

Q And was that the first time that it was ever presented to you that there might be an alternative hypothesis as opposed to race?

A No. I have heard this in other cases, the alternative hypothesis being it is politics; yeah.

Q And how did you eliminate politics--when you were doing your 1998 report, how did you eliminate the political hypothesis?

A I did not eliminate it at that time.

Q You did not?

A Did not.

Q Are you saying that in your--in your Exhibit 47, are you saying that you have eliminated that hypothesis?

A I believe I have done enough analysis of the Peterson analysis to come to the conclusion that race was more important then party.

Q And have you--is that the only way you have attempted to eliminate that hypothesis is refuting the Peterson affidavit?

A Well, no. You take the data from the--all of the [*72] precincts in the district and as we--I have done here in Table 6 array both the racial data and the four--excuse me, the three partisan measures, and then consider whether one is better than the other.

* * *

[*119] Q And what do you mean by electorally competitive?

A Meaning to say that either party would, absent incumbency, have a reasonable opportunity of winning the district.

Q And what do you consider a reasonable opportunity?

A Meaning that when the candidates file and they raise their funds and they go to the voters that they are going to be sitting on pins and needles until the election returns are over.

Q Have you put a number?

A Oh, yes, of course.

Q And---

A (interposing) The criterion that I use in all of my work in political science is that a district that is 60 percent or more in favor of one party--60 percent Republican or 60 percent Democratic--is uncompetitive. A district that is less then 60 percent, 59.9 and lower, in the return is competitive.

Q When you said fair you talked about leaving aside incumbency?

A Well, yes. Incumbency can affect the relative competitiveness of a district.

[*120] Q So if you have a district that is over 60 percent and the elections reflect incumbent voting totals, then would you still--would you say a district is unfair based on election results that are---

A (interposing) No.

Q ---based on incumbency or do you have to use a different number?

A No, we don't have to use a different number. What we just know is that it is--it is highly unlikely that the

challenger, whoever the challenger might be, will in fact make an effective challenge--that is, be able to in fact unseat the incumbent.

There are a few occasions in the United States where districts in the previous election were greater than 60-40 in difference where in the next election an incumbent was unseated, but they are usually in the context of scandals or something like that.

Q Well, do you put a number--I mean, if you put a--you say anything over 60 percent you say is noncompetitive. Do you put a number in terms of what percent you give to an incumbent?

A No, because it is going to vary from district to district.

Q Well, do you have even a--well, do you analyze? Do you compare elections to determine whether or not you can put [*121] a number?

A You can go through and look at the elections and make some assessment of the effectiveness of a challenge. Typically incumbents do not fact effective challenges. There are only a few districts in the country that are ever effectively challenged.

Q Well, I just--I am just trying to figure out--since some of the election data I think that you are relying on here does have incumbents, I am trying to figure out how you determine that a district is not competitive when you know the issue has to do with incumbency.

A Well, that is where you have the data for all--as many elections as you possibly can so you can in fact have some that involve incumbency and don't involve incumbency. I

mean, unfortunately in--I believe of the statewide elections that I am looking at I think only perhaps the '72 election with Mr. Campbell may not have been an incumbent election. I am not sure, but I don't believe he was an incumbent that year. But I think all of the others involving Mr. Helms or the one most recently with Mr. Faircloth, they were incumbents.

Mr. Markham: So the record will be clear, I think you misspoke and said 1972 election.

The Witness: Okay; 1992. I am sorry.

By Ms. Smiley:

[*122] Q So you recognize that incumbency is a difference, but you have not in any way tried to weight or put a number on the incumbency advantage---

A (interposing) No.

* * *

[*122] Q Well, do you have a particular measure or criteria for deciding whether a district is race predominant?

A It has to do again with the assignment of the precincts. Remember, we talked about overwhelming--almost always assigning the black precincts to the black district.

Q Well--all right; so it wouldn't matter, say, in District 12 the fact that it is not majority minority. You would still consider that a race predominant district?

A Yes, because again, statewide it is--you know, the statewide numbers are all in the neighborhood of 20 to 22 percent African American.

* * *

[*131] Q And do you know where the majority of that population growth occurred?

A I think I have seen something on that in Dr. Stuart's report, but I don't recall specifically.

Q Well, do you know anything about North Carolina and its---

A (interposing) Well, I---

Mr. Markham: (interposing) Objection to form.

Q ---population?

A I am not going to speculate, but I do remember the following. That is that generally the counties in the northeastern part of the state have been declining relative to the growth and the growth has primarily been in the piedmont.

Q And the piedmont would be--do you know what towns or counties---

A (interposing) Yeah. Well, you are talking about the so-called Triad, the urban Triad, running from Charlotte to **[*132]** basically Durham with stops in Greensboro and Winston-Salem.

Q So that is where the population growth has occurred?

A Yes, ma'am.

Q If you are going to insert a district, there is one place that you have got population?

A Well, you can insert it almost anywhere when you do it.

Q And in fact that is a prerogative of the General Assembly---

Mr. Markham: Objection to form; calls for legal conclusion.

Q ---in terms of---

A (interposing) It is in fact a prerogative, but the only problem we now have is that one has to do this using race neutral criteria.

* * *

[*135] Q But you have already agreed that that plan, the 1980s plan, would not be constitutional under the 1990s population figures?

A That is correct. Yes.

Q And this is not to be a legal benchmark of any kind?

A I can't assert legal benchmarks.

Q Well---

A (interposing) As an expert I can't do that.

Q Well, I agree. You are not a lawyer, but you cite cases throughout this opinion--I mean, throughout this report, and I just wondered, are you using that term "legal benchmark" in a legal sense at all?

A I think it could be construed that way.

Q Is the 1980s plan an appropriate social science benchmark for determining a racially fair 12 district plan?

A The 1980s plan was determined to be racially fair by the Department of Justice.

* * *

[*138] Q Now, if you were going to address the role of partisan politics or party preference, what data would you need?

A I believe there are sufficient data in the submission materials--that is, the three elections 1988 and 1990, albeit that I consider them somewhat stale, and you have the registration breakdown by both party and race.

Q And that is what you would need to address the issue [*139] of party, or the role of party?

A That would be sufficient.

Q Okay.

A That would be sufficient.

Q Now, what criteria would you use to determine the relative importance of the role of race and the role of party?

A It would be the exact same criteria. If I were to be assessing the predominance of race, I would be looking at the racial characteristics of the precincts. If I were looking at the predominance of party, I would look at the party data by precinct.

Q And would you give--and you had what, four measures of party data?

(Witness peruses document.)

A Yes.

* * *

[*141] Q Well, I thought somewhere in your report you talked about how Democrats could have been put in District 8?

A Yes, if you were going to cut a line between District 9 and 8 over to 12 in Mecklenburg because you have a border there that is coterminous. But they chose not to do that.

[*142] Q And what is your inference on their choosing not to do that?

A My inference is that they did not want to split Mecklenburg more than twice.

Q Do you have any basis for that?

A I remember, I think, Senator Cooper was proud that they hadn't done that anywhere in the state.

* * *

[*143] Q Now, you say in paragraph 15 at the bottom of page 12 that Districts 1 and 12 were created to elect an African American member of Congress?

A Right.

Q And what is the basis for that opinion?

A Well, with some subsequent data that I received I determined that both District 1 and District 12 have a majority of black registered voters in the Democratic primary, so that means that black voters have the ability to control the Democratic nomination and having the ability then to control the Democratic nomination can nominate the Democratic candidate. Then the Democratic candidate can count on some crossover voting in the general election to win.

* * *

[*144] Q Well, would you also conclude from this data that Districts 1 and 12 would allow the election of a Democrat?

A Yes. Whoever was nominated by the Democratic electorate would be--would be elected by the electorate in the general election; yes.

[*145] Q So that might be white or black?

A Yes, but the crucial point to me was that if you have a majority of the registered voters participating in the Democratic primary who happen to be African American that at least gives a very strong opportunity for that group to control the outcome of the nomination.

Q And is there something wrong with that?

A No, there is nothing wrong with that.

Q Okay.

A It is just a fact; yeah.

Q Okay. That is right; it is just a fact. It is just a fact.

A No. There is nothing--nothing normatively wrong with that at all.

* * *

[*156] Q So it doesn't matter to you whether a precinct is 5 miles wide or 10 miles wide. If it is one precinct, then that is a narrow bridge?

A That is relatively narrow; yes.

Q And it doesn't matter the number of miles?

A I guess the more miles, the less narrow it would be.

Q But the problem is, though—

A (interposing) The fewer--yeah, yeah.

Q ---for your criteria it doesn't matter how many miles or how big that precinct is geographically. If it is precinct, you would describe it as a political scientist as a narrow corridor?

[*157] A Yes.

* * *

[*167] Q Well, as a drafter of a plan, if you were concerned with the partisan aspects and creating Democratic or Republican districts, how would you start?

A You would start with the precincts that gave the largest degree of support to Democratic candidates.

Q Precincts or counties?

A Counties and then precincts.

Q And then precincts?

A Yeah.

Q And then you would work along the margins?

A Yeah.

* * *

[*169] Q You say at the bottom of that page 18, "When counties were split to achieve population equality, the racial composition of the components differ little." Which counties demonstrate that?

A Chatham, for example; not much difference.

Q Is that chart 2?

A Yeah, Table 2.

Q Well, 6,000 versus 2,000?

A Right; but then look at the percentages, 20.9 versus 28.7.

* * *

[*172] Q And you particularly pick out Mecklenburg County and Guilford County in terms of looking at the differences?

A And Forsyth as well.

Q Is Forsyth in there?

A Yeah; at the top.

Q At the top; that is why I can't see it. Okay. For those counties, were you using once again your 20 percent?

A These are vastly greater than 20 percent. I mean, Forsyth is like 61 percent difference. Guilford is 41 percent. Mecklenburg is about 43 percent difference. These [*173] are vast differences.

Q So what is--40 percent--what percentage criteria is vast as opposed to enough?

A There are twice--there are twice as many as the--it is significant, a substantively significant number. It turns out they put 88 percent of the black populations in those three counties in District 12.

* * *

[*188] Q ---you apparently are not particularly impressed that the state did not split precincts particularly in the 1997 [*189] plan?

A In comparison to what they used to do, yes, that is an improvement. But the point I think is very important is that they did not use the 1997 precincts. They used the 1990 precincts. So there are places in the state where there were old precinct lines that now split new precinct lines and so you have got some difficulties in election administration with the districts as they were fashioned.

Q But is that something the legislators would have necessarily been aware of?

A If you had asked me my advice, given the *Shaw* litigation and all of that, I would have been prepared and have altered--and I know the system is alterable because Louisiana did it--put in and adjusted the population data to fit the political data after 1996 as you were going to start doing this work in 1997.

Q Well, isn't the fact that there are only two districts (sic) split in the entire plan a positive, I mean, based on 1999 data, obviously.

Mr. Markham: Objection to form.

A It is an improvement over 1992, but again, I just don't think that that is terribly important. It is a question of is it an improvement over 1980s in terms of, again, what was the electoral geography in the '80s and what could one do in that particular plan.

[*190] Louisiana did everything in *Hays* using precinct lines and the court ultimately found that they were not protected by using precinct lines. Precinct lines are now defined racially in the south, and so precinct lines are not a protection.

* * *

[*192] program in 1990. My larger point was it would have been better to have used the current precinct structure so you don't have election administration problems where a piece of the precinct is in one district and another piece of the precinct is in another district.

Q And do you know how many places that occurs in North Carolina?

A No. I have been asking hoping to find that out.

Q And apparently it must be a manageable problem?

A I don't know.

Q You don't know?

A I don't know.

Q So that is speculation? You have no data to support that?

A No. That is correct.

* * *

[*247] Q Well, if the General Assembly did not consider the Gantt-Helms the best political bellwether, would that be a **[*248]** reason why fewer of the districts that show over 50 percent Gantt support in this particular election are not included in the district?

A I guess. All I can say is that as a political scientist that doesn't make any sense. I would use the best and most recent race. And furthermore, if I am trying to construct a district that would be a realistic opportunity district for an African American candidate, I would use the Gantt versus Helms race.

Q But what if the legislature was trying to build a Democratic district?

A That is the theory. That is the theory. They are trying to build a Democratic district.

Q And if they were trying--okay; that is the theory. And if they were trying to build a Democratic district---

A (interposing) Then---

Q ---wouldn't they look at the races that were more bellwethers for Democratic-Republican strength and that did not also have incumbency factors--or, I'm sorry, not incumbency but home court advantage?

A Yeah. I understand what you are saying. It just seems to me for District 6--or excuse me, District 12, I would have used the Gantt-Helms race of 1990.

Q Do you have any information--you said you have read depositions and you got this other information about **[*249]** legislative intent and you have read all these other things. Do you have any information to support your--to support a theory that the legislature in fact relied most importantly on this Gantt race?

A No. I believe Senator Cooper said they didn't.

Q So the fact that you might and this chart gives you your best results--I mean, if the legislature---

A (interposing) But you see, I am not---

Q ---didn't use it---

A (interposing) I am not asserting a defense that this was partisanship.

Q Exactly; you are asserting it is racial?

A Yes. The State is asserting that it is partisan, so---

Q (interposing) And your are---

A ---it seems to me that the best partisan--the best way to get at the partisan data would have been to use the Gantt-Helms race in 1990.

Q But that is only because you consider that a good partisan measure?

A Yes.

Q And the politicians in North Carolina--the Democratic politicians in North Carolina you understand do not believe that that is the best race to use?

A They are entitled--we are entitled to our differences **[*250]** in opinion, yes.

* * *

[*250] Q And based on what you have read, and apparently you have looked at other materials besides data and maps, what your understanding of the importance of registration data to the North Carolina legislators?

[*251] A Not very important.

Q Not very important?

A No.

Q Okay.

A Senator Cooper says that and I would have been surprised if he had said anything but that.

Q Are you inferring that he is lying?

A No, no, no, no. You misunderstood me. I would---

Q (interposing) I would hope so.

A Yeah; I would be surprised--you know, all I am saying is that partisan registration data are notoriously imprecise in

terms of determining whether one is going to vote Democratic or vote Republican.

* * *

[*348] Q You had mentioned earlier in your testimony, I thought, that you found that maintaining the core was a traditional--maintaining the core was something they were trying to achieve--in these districts was something they were trying to achieve in redistricting '97.

A Well, that is--according to Mr. Cohen, that was a goal, yes.

Q And my question for you is as a social scientist or in your assessment of the redistricting cases that have come out since *Shaw* that you have assessed and talked about, would that also be a traditional redistricting criteria?

A No, I don't consider it a traditional districting [*349] principle. It is a principle that legislatures invariably use, because they were having to deal with people that literally believe they own their seats that they have. And they would like to have minimal disruption to the electoral connection between them and the voters that they are representing. So consequently it comes up over and over again.

And so legislatures are in a way you can understand--you may not excuse but you can understand why legislatures are reluctant to make major changes to districts. And it is only in the context of unconstitutional districts that sometimes legislatures are forced to do this. And this goes back to the '60s when, you know, I began to look at one person one vote cases.

So the point is that yes, reality suggests that legislatures and legislators pay a lot of attention. And this is in a way why sometimes when these things all come to fruition in courts perhaps the best possible outcome is what happened in Louisiana and what happened in Georgia, was that the judges ordered interim plans rather than leaving it to the legislature to continue to sort of constantly modify plans based on the unconstitutional plans.

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[*44] Q All right. Well, regardless of what you said, I am still curious as to whether you think *Shaw* as originally decided was wrongly decided. And not to be difficult, but I do believe this partakes of a yes or no answer.

A I am an academic, and rarely is anything yes or no.

Q I am a lawyer, and everything is yes or no.

Ms. Smiley: The witness has answered the question and you are entitled to explain the answer.

Mr. Popper: I apologize for arguing; I apologize.

Ms. Smiley: You may have distracted the witness, Mr. Popper.

A I believe the patterns of interaction are a wonderful basis on which to delineate a district, and therefore a [*45] freeway system is a wonderful basis on which to delineate a district. Whether or not the 12th was a racial gerrymander I don't know. But I don't take exception as a political geographer to the delineation of the district focusing on transportation routes.

Q You have read that decision all the way through, haven't you?

A In 1993 I believe so, quite some time ago.

Q If you were a Supreme Court justice would you have sided with the majority or minority?

A I likely would have sided with the minority because I do believe that the state legislature of each state has an overriding right to delineate districts in the way that they see fit.

* * *

[*46] Q Would you have sided with the majority or minority in *Miller v. Johnson*?

A I do not specifically recall the levels of compactness of the 11th District, but I likely would have sided with the minority.

Q Would the same probably be true for *Shaw v. Hunt* and *Bush v. Vera*?

A I hate to use the word "probably", but I believe probably if I went back and looked at the evidence that I likely would have sided with the minority.

* * *

[*49] In your report did you compare the compactness of the North Carolina districts in the '97 plan to the compactness of the North Carolina districts in the plan that resulted after the 1980s round of redistricting?

A No, sir.

Q Why not?

A One, I am not sure it is as relevant as comparing them to the '92 districts, and —

Q (interposing) Relevant in a legal sense?

Ms. Smiley: Object to the form of the question.

[*50] Q Well, in what sense do you mean relevant?

A In this particular circumstance, one, there was an increase of one district. That changes the system. Two, in terms of the continuity of representation, I think it should be based on the last plan. Three, the 1990s plan had a population disparity of 1.76 and therefore would have been found unconstitutional in 1992 in any case.

Q The 1980s plan?

A Yes, sir. And therefore, is the 1980s plan the most relevant given that it was unconstitutional, given its population disparities.

* * *

[*79] Q You are not prepared to say that there is even one possible African American majority district?

A In the '97 plan, if I recall, but again, I don't have my report in front of me, I believe the 1st District was less than 51 percent African American but still slightly majority in terms of its African American total population. Both of [*80] its compactness indices were above benchmark minimal levels. I suspect I could based on those two elements conclude that in general, yes, there is in the area of the 1st.

Q There may be numerically sufficient numbers to constitute a majority, but my question is do you have an opinion about whether a reasonably geographically compact district could be drawn in North Carolina that encompasses such a majority?

Ms. Smiley: Object to the question; asked and answered. You can go ahead and repeat your answer.

A I did compactness indices, of course, for '92 and the '97 plans' district--districts. I don't have my report in front of me, so I can't look at those coefficients to confirm how far about the benchmarks for low compactness.

But given the fact that a district was delineated, given the fact that it is slightly majority African American, and given the fact that its compactness indices are above the minimum

levels, I think I could conclude that there is a sufficiently geographically compact African American population in that part of the state that could be the core of a district.

Q Do you believe that the measuring unit in constructing what I shall call a *Gingles* district is voting age population or total population or registered voting population?

A This is, of course, an issue that political scientists [*81] debate actively. Political geographers, on the other hand, we have not debated it to any great degree.

Though many would argue that voting age population is critical, and I understand that logic implicitly, it does seem to me that regardless of whether one is 6 months old or 80 years old, one is still entitled to representation even though one can't vote. Hence, I think in terms of my reading, the first place one ought to look is total population.

LESLIE WINNER DEPOSITION (EXCERPTS)

[*69] Q. Well, the first four of those plans did not have a majority African American population, the fifth one is slightly over 50 percent. Do you recall whether or not at that time there was any belief on the part of any of you who were working on preparing plans as to whether it would be necessary to have a majority black district in North Carolina in the redistricting plan?

A. I recall that at some point in time that I formed the opinion that we should have a majority black district in the northeast to avoid being in violation of Section 2 of the Voting Rights Act, but I do not recall when in time I formed that opinion.

Q. How about in terms of pre-clearance, did you form an opinion as to whether or not there was a requirement -- whether or not the Department of Justice would deny [*70] pre-clearance unless there was a majority black district formed?

A. I don't recall forming that opinion.

Q. So your concern then was primarily with respect to Section 2 of the Voting Rights Act?

A. Right.

Q. Can you explain the basis of that opinion -- and, well, first do you have any idea of the time frame in which you formed it?

A. It would have been in 1996 or 1997, and it -- and I think that one of the things that we were trying to do was to determine whether we could make a majority black district in that part of the state that we thought was compact, which would have been relevant to answering that question. So it's not like

you answer it in the abstract and then go try to draw the district, it's a little interactive. I was aware from my previous experience that there was a high level of racially polarized voting in that part of the state.

Q. You mean the northeastern part of the state?

A. Right. And I believe that -- that at some point in time, although I don't remember what year it was, that Adam Stein came to the Redistricting Committee with updated data about racially polarized voting in the northeast part of the state. It must have been in 1997, [*71] because I think the data came from the Gant/Helms 1996 race. The -- and I was of course aware that there was a relatively high concentration of black people living in the northeast part of the state. And I think one of the -- one of the questions we had was whether -- whether there could be a compact district or relatively compact district without going all the way down to Columbus County or Cumberland or New Hanover County that would be majority black, and one of the questions was whether it could really be a district that didn't include Durham because there was some sense that the urban nature of Durham made it pretty different from the rural Eastern North Carolina.

Q. Then did you finally come to the conclusion that it was possible to create a geographically compact majority black district that would not -- in the northeastern part of the state that would not include Durham?

A. Yes, eventually.

Q. Pardon me?

A. Eventually we did.

Q. Can you describe how -- now, did you actually -- did you actually print out or display a district of that type, I mean

so you knew where it was?

A. Well, it's my opinion that the 1997 Senate plan that Senator Cooper presented to the Senate Committee [*72] contains a geographically compact majority black district in the northeast part of the state in it.

* * *

[*78] Q. How does that compare as to the 1st District with the plan that you were mentioning a moment ago, the Cooper plan where you said that you thought they had a geographically compact majority black 1st District?

Ms. Smiley: Which is Exhibit 6?

Mr. Everett: Yes.

A. Well, the '97 plan splits Granville and Person Counties and Senator Cooper's plan didn't split Granville and Person Counties. I believe the adopted plan put more of Pitt County into the 3rd District, which is what Representative Jones, Walter Jones wanted, because he lives in Pitt County. Jones County is mostly in the 1st District in the adopted plan and none of Jones County is in the 1st District in the Cooper plan, which I assume was done to -- in part because of the movement of people out of Pitt County from the 1st District into the 3rd District, to balance out the population. I can't really tell about Lenoir County, whether it's the same or not. That seems to be the biggest difference is that Person, Granville became split, I don't remember why, and -- but [*79] my guess is it had something to do with trying to balance out the 2nd and 4th District, which is a big matter of controversy between the House and the Senate, and that more of Pitt went into the 3rd

to make Walter Jones happy and more of Jones went into the 1st I guess to balance out the population. Those seem to be the major changes.

Q. Which of the two would you view as the more compact, the Cooper plan or the plan, the 1997, that is as to the 1st District?

Ms. Smiley: Object to the form of the question. You can answer that if you can.

Q. I'm sorry, geographically compact.

Ms. Smiley: I still object to the form of the question. You can answer if you can.

A. Well, the Cooper plan seems to have more whole counties and the adopted plan seems to have more fractured counties.

* * *

[*92] A. . . . if I even kept it when I got it. The only thing that I kept at the time was -- I kept some copies of some maps that were kind of on the table at the time and then when we moved on to another map I tended to throw them away because it got too confusing. I didn't keep -- I made no attempt to keep an accurate like historical file of the stuff, because I assumed that the people would in bill drafting, that that was their job, it wasn't my job. So I just kept what was useful to me at the moment.

Q. Let's look at the second paragraph of that e-mail. Can [*93] you give us the benefit of your interpretation of what is meant by that paragraph? And there is a reference in here that Franklin was all in the 1st under Cooper .30 and it's a past

tense, which may or may not be significant, but what is -- what do you interpret that paragraph to mean?

A. The part about Franklin County?

Q. Well, the whole paragraph. The district -- when he refers to improved, what do you interpret that to mean?

Ms. Smiley: Object to the form of the question.

A. I don't know what he meant. Are you asking me what he meant?

Q. What do you think he meant?

A. That in some way he thought the district was better -- well, the first sentence I can't tell whether he's -- on what -- there's some way that he can't make it any better, but since I don't know what Senator Cooper's instructions to him -- I don't know what his goal was so I don't know the answer to that. It could have been political, it could have been racial, it could have been -- and I just -- geographic, you know, pretty, I don't know.

Q. In the context, since it's only a reference to racial, wouldn't it be your interpretation that the improvement [*94] related to changes in racial percentages?

A. No, I wouldn't. I wouldn't necessarily infer that, because as I have previously told you, in that part of the state there are also political concerns about these counties that were in the 1st Senate District, so I don't -- I don't -- and he could have had more than one thing on his plate at the same time.

Q. But when he says I was able to boost the district to 49.28 percent white, 49.62 percent black, what is your interpretation of that sentence?

Ms. Smiley: Object to the form of the question.

Q. What was being boosted?

A. I assume what was being boosted was the black percentage.

Q. And at the same time the white was being reduced?

A. Yes. It appears to be.

Q. And when he says I could probably improve this or thins, t-h-i-n-s, a bit more by switching precincts, would your interpretation be that the improvement was in terms of increasing the black percentage to a higher?

Ms. Smiley: Object to the form of the question. You can answer it if you can.

A. I don't know what he was thinking, but I would infer [*95] from that that he was talking about making the black percentage higher.

Q. Now, do you know whether or not in any way this was against a backdrop of any belief that it had to get up to 50 percent?

A. Whose belief?

Q. Pardon me?

A. Whose belief?

Q. His belief or that he -- that he had been instructed to get it to 50 percent or to try to get it to 50 percent?

A. I don't know whether it was in the backdrop of trying to determine whether it was possible to get it to 50 percent or whether it was in the backdrop that we already knew it was possible but there were some political constraints that we were trying to see if it was possible to do it in some other way. I don't -- it's possible that we already knew it could be done and we were trying to find a different way to do it or it's possible that we didn't yet know whether it could be done.

* * *

[*99] Q. Thank you very much. Returning to the e-mail, which is Exhibit 58. The last sentence there, last two sentences. I have moved Greensboro black community into the 12th. What was the Greensboro black community that he was referring to, if you -- if you know or have any belief?

A. I assume that it means that he had put part of Guilford County, probably -- and probably -- certainly not just the Greensboro black community but part of Guilford County that contained -- part of which was the predominant black precincts in Greensboro, and I assume some other precincts as well, had moved them from I guess the 6th Congressional District to the 12th, and it must have meant that he had moved about 60,000 people into the 12th and to keep the population balanced you would have to take 60,000 people out.

Q. His reference to the black community, does that mean that he would have to take about 60,000 whites out to make up for that or do you --

A. Oh, no, I doubt if that was possible. He probably took -- and I don't know what we took out, but -- and he could have, I don't know. I don't know whether the net impact of that was to increase the black population of [*100] the district or whether it wasn't. He may have taken out -- and you can't tell from this. I'm sure it wasn't 60,000 black people that he moved in. It may have been just like 30,000 or 25,000, and you can't tell from this whether that had a net impact of increasing the black population of the district or whether it kept just even or -- you can't tell.

Q. Do you have any recollection as to how many African

Americans in Guilford County were in the 12th District under the 1997 plan?

A. No.

Q. Nor how they were allocated between -- how many were in High Point on the one hand and Greensboro on the other or some third place, you don't know any allocation?

A. Well, I don't believe there would have been a third place, but -- and there is some territory between High Point and Greensboro and it may have some black people that live in it too, I don't know.

Q. I was thinking places like Jamestown and out in that area. I don't know.

A. Jamestown is pretty republican, so I doubt if we intentionally put it in the 12th District, but it may have been just for geographic reasons.

* * *

[*105] Q. Okay. Let me rephrase it. Do you remember Senator Cooper, for example, saying that the 12th District as created in the plan was not majority black and therefore the requirements of *Shaw V Reno* would not apply?

A. I remember he said that kind of after the fact, but I don't recall that that was ever stated as a goal.

Q. And when you say -- I'm sorry, go ahead.

A. I think after the plan was -- had already been developed -- and I don't remember whether it was the Senate plan that he was referring to or the compromise plan that he was referring to, but what I remember is that -- that it was a hindsight statement, it wasn't something that was a goal.

Q. So there was a plan and he was talking about that and in that context making that comment?

A. As a justification -- as a defense of the plan, not as a reason for having created it.

Q. Did you agree with that defense?

A. Honestly, my opinion is that the case law in that area is somewhat of a muddle. I haven't kept up with reading all of the cases and I don't believe that I either agreed or disagreed. I thought it was a plausible argument.

[*106] Q. Do you know whether or not he obtained any sort of legal advice before he made that statement on the floor?

A. I don't know.

Q. Are you aware of any advice that was ever given to either the members of the Redistricting Committee or anyone in the General Assembly to the affect that the12th District might be subject to strict scrutiny even though it was not created as a majority black district?

A. I think that Senator Alran said that you said that.

Q. Yeah, so -- so that was --

A. And I think it was Senator Cooper was responding to Senator Alran's having said that you said it in a floor debate.

Q. So he took that position in response to something I was alleged to have said?

A. I can't say what motivated him, but my memory is that Senator Alran said that on the floor as a reason to vote against the plan and Senator Cooper responded in a floor debate saying that he disagreed with you.

* * *

[*108] Q. Okay. Fine. What about predominantly race based, what does that mean to you?

A. That the primary motivation for creating it was to achieve either some racial separation or some racial percentage or some racial mix or something that had to do with race.

Q. And if some other justification or reason is offered then it's perfectly permissible to have it as race based [*109] as one chooses?

A. That's a question of law, I think.

Q. Well, in other words could the General Assembly take another look -- the new General Assembly that was elected in 1996, take another look at the 1992 plan and say we like the results that were generated under that plan, we're going to reenact it and it's no longer race based, would that be permissible, in your opinion?

A. I think it would just be a question of fact whether that was a pretext or whether they really had some other non-racial reason for doing it, but that's not what we did.

Q. So as long as it was not a pretext, it would be permissible to do that in your opinion, it would be a factual issue?

A. It's my understanding of the case that they inferred from the shape that it was racially -- race based, but that I suppose it would have been possible to prove that it wasn't. In that case in 1992 it clearly was race based since the Justice Department had told us that we had to draw a majority black district, so there was no point in trying to prove that it wasn't.

* * *

[*111] Q. Well, what would be your understanding of a term like core, maintaining the core?

A. That -- and it's subjective, but for any -- for any incumbent you would have a constituent base that you considered to be your core constituent base and that -- that you would like to keep if the district was modified. Now, I don't know that we did that in this case. I'm -- as a matter of fact I don't think we did do it in all cases in this case. For example, Eva Clayton may have thought that the black communities of Fayetteville and Wilmington were part of her core constituent base and she didn't keep them. Mel Watt may have thought that the black community of Durham was one of his core constituent bases and he didn't keep that. So I don't think that we in fact did maintain the core of all these districts.

* * *

[*129] Q. I see, okay. Now, Senator Cooper has referred to accepting certain data from the National Committee for an Effective Congress. Did you receive -- were you a participant in receiving any such data, did you have any [*130] contact with that committee that you recall?

A. I was a secondary recipient of it.

Q. I'm sorry?

A. I didn't talk to them myself but Senator Cooper shared their reports with me.

Q. Okay. Do you remember the nature of that data and how it was used?

A. We thought it was a more reliable indicator of the

partisan balance of a district than voter registration was. I didn't think voter registration was very useful information, because in North Carolina more and more registered democrats don't always vote democrat, so having -- and as you know the election data that we had on the legislative computer was very old, so having access to more current election data was useful to determine partisan.

Q. Do you remember any particular insights you received from that data and tried to use in drawing the '97 plan?

A. By 1997 the congressional delegation had six democrats and six republicans, and it seemed apparent to me that if we were going to get a plan adopted by the House which was the majority republican and the Senate which was the majority democrat that the only plausible way to do that was to have a plan that had six districts that were at least leaning democrat and six districts that [*131] were at least leaning republican.

Q. Now, when you started the process or you were drawing some plans in the summer of 1996 the balance was 8/4 republican, wasn't it?

A. Right.

Q. Then it became 6/6 as of November, 1996.

A. Right.

Q. When you were drawing the plan, did you or Senator Cooper -- this is the '97 plan. Did you know that Congressman Hefner was going to be leaving?

A. I don't think we did. I don't think we knew that. I don't even think we knew it when we were drawing the '98 plan.

Q. And so that district was left the same in both plans in any event?

A. Well, there was no need to change it between '97 and

'98, but one of the complications is that I believe that Senator Hefner lives in the corner of Cabarrus County that's close to Mecklenburg County, so we didn't want to put him in the -- we wanted to keep him in his own Congressional District.

* * *

[*132] Q. Going back to the preserving partisan balance. After Hefner retired that district in the last election went republican, if you were trying to preserve partisan balance, why didn't you strengthen the democratic character of Hefner's district when you were drawing the '97 plan and '98 plan?

A. Well, I think that that district is the democratic leaning district. You know, there are no guarantees in [*133] this game, but you had a very strong widely known popular republican candidate and a democratic candidate that didn't mount much of a campaign. Nobody said that we were drawing districts that would be guaranteed to go one way or the other and I don't think we were even trying to guarantee safe seats, but we were trying to create some balance between what you would call safe seats, swing seats and safe seats the other way, and I don't know, I don't think that you can conclude anything from the fact that Robin Hayes won that district, and he may not keep it, who knows.

Q. So your conclusion is that under the circumstances then the drawing of the district from which Hefner -- well, the drawing of that district in which Hefner was serving was done in a manner that would give him pretty good assurance -- it would be democratic leaning at least you would say?

A. It was democratic leaning, and as you look around the

borders of it, I don't see anything right on the edge of it that would have made it more democratic that wouldn't have hurt the 7th District.

Q. What about adding some of the democrats from Mecklenburg County?

A. Well, the part of the Mecklenburg County that borders on the 8th District is not democratic.

[*134]Q. So you're saying there was no way to add the Mecklenburg democrats and take some out of the --

A. Not unless you were going to do a polka-dot.

Q. With respect to --

A. Let me be more specific. Mecklenburg County along the Union Mecklenburg line is highly republican.

Q. Okay. And --

A. And also on the Cabarrus Mecklenburg line it is leaning republican. And I guess it's possible that there might be -- that you could put Davidson Town into it, but then Mecklenburg would have been divided into three districts, which was something that we absolutely didn't want to do.

Q. Now, the town of Davidson currently is in the 12th District?

A. Right.

Q. Is all of it or is it split or do you recall?

A. I believe it all is. But we absolutely didn't -- and one of the real complaints we had had from the '92 plan was that Mecklenburg was divided into three congressional districts with just a tiny little bit of it in the 8th, and people really didn't like that.

* * *

[*135] Q. There's a phrase that's been used from time to time, functional compactness. What do you interpret that to [*136] mean or have you used that phrase at all yourself?

A. Yes.

Q. And when you used it, what did you mean?

A. Well, I used it in the context of a case I handled in Columbus County in the early 1990s, in which what we meant then was that although the black community was split between two towns, I believe Taber City and Whiteville, that they shared a black community leadership, they shared a community of interest, that it was -- that there was easy communication between them, wasn't quite as hard to get from one place to the other and that they had some shared political concerns and that therefore they were functionally compact, and Judge Brett agreed with that. I think it was Taber City and Whiteville.

Q. So it was in that context that you used it in the past?

A. What I think it means is that -- that it's more important whether it ends up being a district that you can successfully represent than it is precisely what shape the district is, which is just -- which doesn't have anything to do with democracy or representation. But let me add that I haven't done any legal research on that theory since 1991 or 2 or whenever that was I did that case.

* * *

[*138] Q. You did not, okay. In consideration of the Cochrane proposal, Senator Cochrane's proposal, did you consider what alternatives might exist in terms of drawing a

district that would go from Charlotte toward the -- toward the east and include some of the counties there instead of going up to Greensboro and Winston Salem?

A. I considered Senator Cochrane's proposal.

Q. And did you consider perhaps modifications of it, whether something could be better constructed, not necessarily what she had but something that would move between Charlotte and the Eastern part of the state and would constitute a desirable district?

A. Let me answer that in two ways. She did not consult with me in developing her plan, so I didn't have an opportunity to say why don't you try moving it this way or that way or add this or subtract that. She did not consult with me. In general I would say that I am familiar with Union, Anson, Robeson, Scotland, and Cumberland Counties and that I do not think that [*139] they bear much in common with what I know of Mecklenburg County. They are rural, agrarian, military, have bad roads. The roads are getting a little better but at that point in particular it was very hard to get from here to there, they -- their housing and health care and economic problems were substantially different from Mecklenburg's, although in recent years we've had a little Suburban creep into Union County, but that's also recent, whereas the Piedmont Crescent is a name that's been around, wasn't invented for this District, it's been around for a long time. You know, there actually is a fault line that -- where the soil changes and the economy changes and we're on one side of it and Anson County is on the other side, whereas this whole Piedmont Crescent has the same kind of textile history more industrialized, more urban now, more banking, more electronics, more universities, and although the

people make fun of the roads, the roads do make it an easy district to represent, because you can have district meetings that -- with the '97 plan you have a district meeting in Salisbury and everybody in the whole district can get there in an hour, so it -- the northern route always made more sense to me and I never-- from a constitutional viewpoint I never could understand why a Court would care whether you went north or east. I [*140] didn't view any constitutional significance of that question.

Q. With respect to -- you mentioned Salisbury when you considered a desirable change that in the 1998 plan all of Rowan County is in one district instead of being split?

A. Personally, honestly I thought it was a ridiculous change, but it was very clear to me that that's what the Court wanted to see. And if you were trying to get a Court approval-- the notion that it mattered to this district that we included southern rural Rowan County did nothing to enhance the district from a viewpoint of making it a good district to represent or anything like that. It made it prettier, there's no question about that, but I didn't -- I thought it -- it was really six of one half dozen of the other. I really didn't think it made an difference in the district. It didn't have very many people in it.

Q. Don't you think it makes a difference to have all of one county in one district to whatever extent feasible?

A. Actually, personally I do not. I've never been a big advocate of keeping counties whole. I think the role of counties is overrated in this debate. I think it was much better for Mecklenburg County to be divided than it would be to have it whole, that it has absolutely [*141] enhanced our representation in Washington by having a republican and a

democrat who sort of -- we've doubled our umph. We have one person that can talk to the administration, somebody else that can talk to the leadership of the House. We get two different perspectives. I see no disadvantages and numerous advantages to having your county divided.

Q. And would that be equally true with having the City of Charlotte divided or the City of Winston Salem or some other city?

A. I just don't think it matters.

Q. Do you remember whether one of the goals were stated -- whether there was any goals stated of not dividing political subdivisions or not dividing counties, whether that was one of the goals stated at any time in regard to the plan?

A. Let me say this. There was a goal of not dividing precincts, which I think was a very important goal, because when you divide a precinct it's hard for people to know who their representative is and you have to like say well if you live on the east side of Jones Street you have this representative but if you live on the side of it south of -- and it's very confusing just to even tell somebody who their representative is, so I think that dividing precincts is something that's good **[*142]** to avoid. I think that dividing -- I've heard some rural legislators say that if you divide a little teeny tiny county up that they end up feeling like they don't have any impact at anybody's district, and I've thought that that was a legitimate consideration, but in terms of as a general matter do I think it's bad to divide counties, I don't think it's bad but I do recognize that it's more politically popular not to, that I'm somewhat in the -- that there are people that disagree with me.

Q. You've heard the phrase traditional districting

principles, have you ever heard that being used?

A. Well if you talk about traditional districting principals in terms of decades, traditionally we didn't care about one person one vote.

Q. Well I'm talking about in the context of compactness, contiguousness and not dividing political subdivisions. Have you ever heard any of those referred to as traditional districting principles?

A. I don't think that not dividing whatever that last thing you said was.

Q. Political subdivisions.

A. I don't think that is a traditional districting principal. Well, and I guess prior to 1980 the North Carolina constitution said you couldn't divide counties and districting the legislature but the Justice **[*143]** Department objected to that, that part of the constitution had never been pre-cleared.

Q. Now, the '97 plan, the 12th District has 6 out of 6 counties divided, and is it true that -- you don't think that's important one way or the other?

A. I do not find that to be problematic.

Q. And in the 1st District they've got 10 out of 22 divided and you don't find that problematic?

A. The piece that I find a little problematic is this little piece of Jones County that's split off, but of course that was done for political reasons, it wasn't done for racial reasons. It was done because -- what's his name -- Representative Jones wanted more of Pitt County in the 3rd so we had to add something and then you had to get the numbers to balance. But like Beaufort County is split and although you can't tell it from this map this is a big body of water right here and you can't

even get from this part of Beaufort County to that part of Beaufort County without going around this way. So I think dividing Beaufort County along that big body of water, which I'm embarrassed to say I cannot remember the name of, is not particularly problematic. I think that there are bad ways to do it but I don't think it is on its face bad.

Q. And by the way, I made a mistake when I said 10 out of [*144] the 22, I think it's 10 out of the 20 that are divided. And by the same token would you think it's perfectly okay to divide a town like Greenville and put the black portion of the town in the 1st District and the predominantly white in the 3rd?

A. Well you're making an assumption that the race was the motivation, which might be unconstitutional but --

Q. I'm just asking whether the fact that as divided it is divided along racial lines, whatever the reason for it, whether that in your view makes any difference.

A. Well I don't know whether that's true or not, but I don't find dividing a town in and of itself to be a bad practice.

Q. But the county is no problem?

A. As I said, I think there are bad ways to do it but I don't think it's necessarily a bad thing to do, and sometimes I think it's an affirmatively good thing to do.

Q. You mentioned the happy state when there are two congressmen who can represent Charlotte and Mecklenburg County. Would you feel the same way if the Congressmen from the 12th District were from Greensboro, Winston Salem instead of from Charlotte?

A. As long as he was -- he or she was responsive to me when I called him up it would be okay with me. Now I have to [*145] say that one of the things that I was concerned about in

the 12th District was keeping a substantial portion of Mecklenburg in it, because I thought that that would help Mel be reelected as opposed to having the heart of it shift north.

Q. The heart of it was Mecklenburg basically?

A. Well, I think not -- I don't think it's half, but somewhere close to half of it is Mecklenburg. And I thought that that -- that that would help Mel -- also Sue Myrick wanted a substantial part of Mecklenburg to be in her district, so we had to be careful to divide Mecklenburg in a way that both of them got a substantial hunk of Mecklenburg.

Q. And hopefully each of them got what they wanted, would that be true?

A. I doubt if either of them got precisely what they wanted but I think that both of them were okay with it.

* * *

[*146] Q. And do you recall some specific modifications that were made to Mecklenburg County and why they were made?

A. Well, one thing that we ended up trying to do was make sure -- make Gaston and Cleveland Counties whole, so if -- to do the one person one vote and end up with Gaston and Cleveland being even and not just needing like one precinct in Lincoln County or leaving one precinct out of one of those counties, the easiest way to do that was to figure -- to add their populations [*147] together and figure out how much of Mecklenburg needed to be in the 9th to get those two counties to be able to be whole and then put the rest of Mecklenburg in the12th. So to some extent the exact line between the 12th and

the 9th in Mecklenburg County had to do with how -- how it affected the population of the 9th District to be able to make that be a clean district. And when we changed it in the '98 plan we added more of Mecklenburg in the 12th than -- we added enough more to put all of Lincoln County into the 9th, so that -- that seemed a preferable way of doing it than having just a small fraction of a county into or out of the 9th.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,	)
Plaintiffs,	)
and	)
JAMES ARTHUR "ART" POPE, *et al.*,	)
Plaintiff-Intervenors,	)
v.	)
JAMES B. HUNT, JR., *et al.*,	)
Defendants,	)
and	)
RALPH GINGLES, *et al.*,	)
Defendant-Intervenors.	)

DEFENDANTS' MOTION TO CONSOLIDATE
Fed. R. Civ. P. 42(a)

Defendants' move the Court pursuant to Rule 42(a) of the Federal Rules of Civil Procedure to consolidate *Cromartie v. Hunt* (No. 4:96-CV-104-H2) (E.D.N.C.) and *Daly v. High* (No. 5:97-CV-750-BO) (E.D.N.C.) with this case for all purposes. In support of this motion, defendants rely on their memorandum filed herewith.

STANDARDS FOR DETERMINING MOTIONS TO CONSOLIDATE

Rule 42 motions are addressed to the court's broad discretion and provide a powerful tool for managing litigation to assure judicial economy, fairness and the interests of justice. *See* 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 42.10(3d ed. 1997). The sole legal requirement that must be met for invoking the Court;'s discretion is that the cases to be consolidated present common issues of law or fact. Generally this means only that the cases should be of "like nature." MOORE'S ¶ 42.10 [1][b], p. 42-10. Once this threshold is met, the Court should consider conservation of resources, fairness, and the interests of justice in deciding whether to exercise its broad discretion. MOORE'S ¶ 42.10[4], pp. 42-16 to -18.

CROMARTIE AND *DALEY* SHOULD BE CONSOLIDATED WITH THIS CASE

The threshold Rule 42(a) requirement that this case and *Cromartie* and *Daly* present common questions of law or fact is plainly met. The claims and legal theories advanced by the plaintiffs in this case are identical to the claims and legal theories advanced by the plaintiffs in *Cromartie* and *Daly*, and the facts found by this Court in ruling on the State's's 1992 congressional plan provide the necessary framework for determining whether the State's 1997 congressional plan cures or continues the defects in the 1992 plan. Moreover, the partial identity of the plaintiffs in this case and in *Cromartie* (Cromartie and Muse) and the complete identity of the defendant int his case and in *Cromartie* and in *Daly* make these cases "apt candidates for consolidation." *Hanes Cos. v.*

Ronson, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988) (quoting 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2384 (1st ed. 1971)). *See also* MOORE'S ¶ 42.10 [1][c], p. 42-12.

The benefits which will result fro consolidation of these cases are compelling. There will be at least a fifty percent savings in judicial resources, a doubling of legal resources for the plaintiffs, and the elimination of duplicative or repetitive discovery demands. All of this can be achieved without any prejudice or unfairness to any party in any of the cases.

For these reasons, defendants request the Court to enter an order consolidating *Cromartie* and *Daly* with this case for all purposes.

Respectfully submitted, this the 14th day of October, 1997.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing **Defendants' Motion to Consolidate** and **Defendants' Memorandum in Support of Their Motion to Consolidate** in the above-captioned action upon all parties to this case, *Cromartie* and *Daly* by depositing a copy in the United States mail, first-class postage prepaid, addressed as follows:

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This the 14th day of October, 1997.

/s/Tiare B. Smiley
Special Deputy Attorney General

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs.)
and)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
JAMES B. HUNT, JR., *et al.*,)
Defendants.)
and)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE

This memorandum is submitted by defendants in support of their motion to consolidate *Cromartie v. Hunt* (No. 4:96-CV-104-H2)(E.D.N.C.) and *Daly v. High* (No. 5:97-CV-750-BO) (E.D.N.C.) with this case for all purposes.

CASES TO BE CONSOLIDATED WITH THIS CASE

A. *Cromartie v. Hunt*. The complaint in this case was filed on July 3, 1996, by Robinson Everette on behalf of Martin Cromartie, Thomas Muse and Glennes Weeks claiming that North Carolina's *1st* Congressional District as contained in the State's 1992 congressional redistricting plan was an

unconstitutional racial gerrymander.[1] The defendants in *Cromartie*, as in this case, are the Governor and the State Board of Elections. By a series of consent orders, all proceedings in *Cromartie* have been stayed. On October 11, 1997, however, Mr. Everette moved the Court to dissolve the current stay so that he may file an amended complaint on behalf of Mr. Cromartie, Mr. Muse and certain other plaintiffs claiming Districts 1 and 12 in the State's 1997 congressional redistricting plan are unconstitutional racial gerrymanders. That amended complaint was lodged, but not filed, with the Court pending the Court's lifting the stay.

B. *Daly v. High*. The complaint in this case was filed in the Western District sometime in 1996 but never served on defendants. On January 21, 1997, plaintiffs filed an amended complaint and served that amended complaint on the defendants who are essentially identical to the defendants in this case. In the amended complaint a number of citizens claimed that several districts in the State's 1992 congressional redistricting plan as well as certain districts in the State's 1992 legislative districting plans were unconstitutional racial gerrymanders. Defendants moved to dismiss the amended complaint for improper venue. Plaintiffs never responded to that motion, and by order dated August 27, 1997, venue was transferred to the Eastern District. On October 9, 1997, plaintiffs moved to amend their amended complaint. In their

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[1] Mr. Cromartie, Mr. Muse and Ms. Weeks are also parties to *this* action having been added as plaintiffs by this Court's. July 11, 1996, order which allowed plaintiffs' motion to amend their complaint.

second amended complaint, plaintiffs seek to challenge Districts 1 and 12 in the State's 1997 congressional redistricting plan as well as several districts in the State's 1992 legislative redistricting plans. From the amended complaint it is plain that the focus of their congressional challenge is Districts 1 and 12.

STANDARDS FOR DETERMINING MOTIONS TO CONSOLIDATE

Rule 42 motions are addressed to the Court's broad discretion and provide a powerful tool for managing litigation to assure judicial economy, fairness and the interests of justice. *See* 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 42.10 (3d ed. 1997). The sole legal requirement that must be met for invoking the Court's discretion is that the cases to be consolidated present common issues of law or fact. Generally this means only that the cases should be of "like nature." MOORE'S ¶ 42.10 [1][b], p. 42-10. Once this threshold is met, the Court should consider conservation of resources, fairness, and the interests of justice in deciding whether to exercise its broad discretion. MOORE'S ¶ 42.10[4], pp. 42-16 to -18.

CROMARTIE AND *DALEY* SHOULD BE CONSOLIDATED WITH THIS CASE

The threshold Rule 42(a) requirement that this case and *Cromartie* and *Daly* present common questions of law or fact is plainly met. The claims and legal theories advanced by the plaintiffs in this case are identical to the claims and legal theories advanced by the plaintiffs in *Cromartie* and *Daly*, and the facts found by this Court in ruling on the State's 1992 congressional plan provide the necessary framework for determining whether the State's 1997 congressional plan cures

or continues the defects in the 1992 plan. Moreover, the partial identity of the plaintiffs in this case and in *Cromartie* (Cromartie and Muse) and the complete identity of the defendants in this case and in *Cromartie* and in *Daly* make these cases "apt candidates for consolidation." *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988) (quoting 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2384 (1st ed. 1971)). *See also* MOORE'S ¶ 42.10 [I][c], p. 42-12.

The benefits which will result from consolidation of these cases are compelling. There will be at least a fifty percent savings in judicial resources, a doubling of legal resources for the plaintiffs, and the elimination of duplicative or repetitive discovery demands. All of this can be achieved without any prejudice or unfairness to any party in any of the cases.

For these reasons, defendants request the Court to enter an order consolidating *Cromartie* and *Daly* with this case for all purposes.

Respectfully submitted, this the 14th day of October, 1997.

MICHAEL F. EASLEY
ATTORNEY GENERAL

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*, Plaintiffs.	)	
and	)	
JAMES ARTHUR "ART" POPE, *et al.*, Plaintiff-Intervenors,	)	
v.	)	**ORDER**
JAMES B. HUNT, JR., *et al.*, Defendants.	)	
and	)	
RALPH GINGLES, *et al.*, Defendant-Intervenors.	)	

Defendants' motion to consolidate *Cromartie v. Hunt* (No. 4:96-CV-104-H)(E.D.N.C.) and *Daly v. High* (No. 5:97-CV-750-BO) (E.D.N.C.) with the above-captioned matter is DENIED.

This 16 October 1997.

For the Court:

/s/ W. EARL BRITT
United States District Judge

Filed October 16, 1997

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TRIAL TESTIMONY OF GERRY COHEN, *SHAW V. HUNT*, 92-202-CIV-5BR (EXCERPTS)

[*341] Q. Mr. Cohen, you testified yesterday about the genesis of the Peeler Plan put on the legislative computer system. Are maps 418 and 422 maps of the Peeler Plan?

A. Yes, those two maps are maps of the Peeler Plan.

Q. All right. And does the Peeler Plan contain two majority minority districts?

A. Yes, it does.

Q. Where are they located, generally?

A. One of them is located, beginning in Charlotte, up [*342] through Statesville, east through Salisbury, and on through Greensboro to Durham, and then several counties north of Durham along the Virginia border.

The second starts in Warren County, runs through much of the eastern part of the state, down to New Bern, Wilmington and Fayetteville.

Q. All right. Without repeating too much of yesterday's testimony, could you indicate, briefly, what were the first major changes you made to the Peeler Plan?

A. The first two major changes that I made in the Peeler Plan was adding a large portion of Winston-Salem, as I mentioned yesterday, along the goal of adding another urban area as requested by Mr. Robert Hunter, and also making the district more urban.

At the same time, portions of four counties along the Virginia border were removed; Caswell, Person, Granville and Vance.

Q. You explained yesterday using Exhibits 406 and 407, your reference to population?

A. Yes. At that point, we ran a report looking at the population of which cities were in that district, and looked at those tables I was referring to, just before adjournment of the Court yesterday, as to which cities were sized to be considered urban in North Carolina context, the largest 25 incorporated places. [*343] And I noticed that approximately 80 percent of the12th District was in communities, incorporated places of 20,000 or over; whereas, about 80 percent of the population of the 1st District was in places of 20,000 or under. Seemed to be co-existent of a suggestion of public hearing the 12th District be urban in nature.

Q. When you used the population statistics in Exhibits 406 and 407, were you just looking at the black population statistics?

A. No, I wasn't looking at them at all. I was looking at the report of the total population of the 12th and 1st District -- that were in the 1st and 12th Districts, not at the racial classification of any of the populations.

Q. All right. Did this urban/rural concept guide your efforts, your later efforts on the plan?

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. Yes, it was a central part of the plans for finishing the Redistricting Plan from that point forward.

Q. And did you discuss this urban/rural concept with the leadership?

A. Yes. After noticing it myself, I did report that finding in discussion with the leadership.

Q. In your own view, are there similarities or commonalities of interest in the urban areas of the 12th?

[*344] Mr. Farr: Objection.

Judge Phillips: Overruled.

A. Yes. From my knowledge and experience, both from being Director of Bill Drafting, and also from studies that I worked on in 1982 and 1983. -I have been Staff Counsel to a legislative study commission on the North Carolina railroad, where I was required, and did, spend, several weeks traveling along the railroad corridor from Charlotte on through Durham, and then onto Goldsboro and Morehead City. And made a lot of observations at that point about the nature of a lot of these counties in this area, especially the urban counties. And I felt then, as I do now, that there are major similarities between the communities, the urban communities and Piedmont Urban Crescent, all of which are from Durham west are in the 12th District.

* * *

[*347] Q. All right. Gerry -- Mr. Cohen, as you worked on Redistricting in the '90's, were you familiar with the existing districts in the 1980's of the Congressional Districts?

A. Yes, I was familiar with them.

Q. Did you know where the incumbents lived?

A. Yes, I do. And did.

Q. And did you give any consideration to where the incumbents lived or what might be called the core of their districts?

A. Yes. One of the factors used in my drawing of the Plan was to have each incumbent member of congress be in a separate district from each other, no pairing. In the second

ones, to the extent possible, while creating two [*348] minority districts and keeping them urban and rural, also to preserve the core of existing districts.

Q. And did you use the same district numbers for incumbents?

A. Yes. The district numbers in Chapter 7 are the same district numbers that each incumbent congressman had in the prior decade, with the exception, of course, of the 12th District, which was an open seat.

* * *

[*402] Q. In the enacted plan, you drew two majority black districts?

A. Yes, I did.

Q. Was race a factor in drawing those districts?

A. Yes, it was.

Q. Was race the sole factor?

A. No, it was not.

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. No, it was not. There were a number of other factors that I discussed, chords of existing districts, presuming the opportunities of incumbent congressmen to be reelected, accommodating concerns of individual legislators, members of Congress, committee chairs, other things that I covered in my testimony already.

Q. Does that include the urban/rural analysis?

A. Yes, and including the keeping the 1st and 12th District, one very urban in nature and the other very rural in nature.

* * *

[*420] Q. Q. Mr. Cohen, I think you testified yesterday that when drafting what became Chapter 7, that one of your jobs was not to screw Republicans?

A. Yes.

[*421] Q. Isn't it true, Mr. Cohen, one of your other jobs was to make sure you protected the incumbent Democratic congressmen?

A. Yes.

Q. And Mr. Cohen, if the Republicans ended up getting screwed a little along the way, you wouldn't lose your job; is that correct?

Ms. Smiley: Objection to the form of the question.

Judge Phillips: Overruled.

A. My objective in protecting incumbent Democratic congressmen was to try to preserve – my understanding was to preserve the general partisan balance of the delegation as it existed in the 1980's, not shift it dramatically one way or the other, as various different alternatives might have done.

* * *

[*466] Q. And in your view, Mr. Cohen, in the enacted plan, would you describe District 1 and District 12 as being geographically compact?

A. Well, my definition of geographical includes political, economic geography. Geography, in my view, is not just maps; it includes the entire totality of the political process. Geography isn't just county names.

From the context of – you asked me about the 1st and 12th in the enacted plan or just the first-

Q. 1st and 12th?

A. I believe, from the context of political geography, communities of interest, commonalities of interest, that those districts are, in fact, compact because they put together persons with commonalities of interest with common history, common factors, tying different parts of the districts together.

* * *

[*468] Q. You prepared a statement in that submission; *Gingles* requires a district be geographically compact in order to satisfy one of the prongs of the initial test?

A. Yes.

Q. When you made that statement, Mr. Cohen, were you using compactness to mean geographically compact or the definition of compactness that you just gave us a few minutes ago?

A. I was dealing with my definition of compactness as I knew from alternative plans that I had seen at that point in time, which included through the Balmer 8.1 Plan, but didn't include the enacted plans.

I believe at that point, in commenting there, I was commenting on geographical compactness more in the lines of the map making sense.

[*469] Q. Okay. And, Mr. Cohen, would you agree that there are situations where minority districts cannot be drawn because the majority population is geographically dispersed?

A. I don't think that it's geographical dispersion. My view at this point about compactness is that geographical dispersion does not have an absolute, at least insofar as it's been crossed by Chapter 7.

Q. Could you please turn to page twenty-nine of Exhibit 425?

A. Yes.

Q. Is it fair to say on page twenty-nine you were responding to a comment that the ACLU made about Legislative Districts?

A. Yes.

Q. Did you not say that another district couldn't be drawn because black population was geographically dispersed?

A. I think there's a difference between standard of compactness that I would apply in the state Legislative Districts and Congressional Districts because of the, you know, part time nature of legislators, the absence of any staff, as opposed to Congressional Districts where members of Congress have far different resources at their behest and abilities to communication through different parts of **[*470]** their district.

* * *

[*470] Q. Mr. Cohen, I think when we broke up I asked you a question; I think you gave the explanation. I would like to ask you again.

A. All right.

Q. Do you not agree there were circumstances where the geographic – the dispersion of the population concentrations preclude – exclude the creation of majority minority district?

A. Yes. There are situations where geography could be a deciding factor in that.

Q. Okay. And don't you also agree, as you understand the voting rights act, that act did not require the state to stitch together geographically dispersed black population centers?

A. I agree with that; although, as I have said, my definition of geographical compactness includes the communities as compact if they share commonalities of interest. So, yes, I still agree with that statement.

* * *

[*488] Q. We have Exhibit 302 up here, Mr. Cohen. This is a map of the enacted plan?

A. Yes.

Q. Would you agree that District 1 and District 12 are materially stranger in appearance than at least some of the other districts in Chapter 7?

A. From the context of compactness that I have used, including commonalities of interest and communities of interest. I think those two districts and the 4th District are the most compact in the state in terms of political communities.

Q. That wasn't the question I asked you.

A. I answered the opposite way. No, it's not the least compact.

Q. Let me ask it again. I'm not sure what your answer was. My question was, do you agree that the 1st and 12th Districts are materially stranger in appearance on that map

than at least some of the other districts as reflected on the map?

A. Materially stranger in appearance, yes. I agree that [*489] it is materially stranger in appearance, yes.

* * *

[*497] Q. All right. Mr. Cohen, I now want to ask you about the chronology of events related to the objection letter that was received related to Chapter 601?

A. Yes.

Q. Is it not true that you attended a meeting with the Justice Department officials on December 17, 1991, in Washington, D.C.?

A. Yes, it is true.

[*498] Q. And Senator Winner, Speaker Blue, Representative Fitch were present at that meeting with you?

A. Yes.

Q. John Dunne, at that point in time, hope I get his title right. Was he the Assistant Attorney General for Civil Rights?

A. I'm not sure of his title.

Q. Did you get the impression he was in charge of the Voting Rights Section for the Justice Department?

A. I got the impression he was making the decision. On the title, whatever title you have to have to do that.

Q. Since the general population of North Carolina was 23 to 24 percent black, it would be fair to have two majority minority districts?

A. He posed it as a question to us. I recall his words were, North Carolina is about 23 or 24 percent black and the plan you submit to us, only one out of the 12 districts or eight percent are black. Don't you think it would be more fair to have two. That it would more roughly reflect the state's population. I recall him asking that as a question, which is more or less of the same as to what you said.

* * *

[*543] Q. Mr. Cohen, you spoke of creating a rural district and an urban district?

A. Yes, sir.

Q. You meant a rural black and urban black; is that correct?

[*544] A. Yes.

DEPOSITION TRANSCRIPT OF GERRY COHEN IN *SHAW V. HUNT*, 92-202-CIV-5-BR (EXCERPTS)

Q Okay. Basically I was asking you about what the percentage was that you were using in the--what percentage of minority, of black, you were using in the second plan, and you might compare that with the percentage you used in the first plan.

A Well, I stated--you asked what was used. Numbers that were used were higher than in the first plan. In the case of the 1st District, it was 57.26 percent black total population, District 12, 56.63 black in total population. And those numbers were designed to meet the requirements of Section 2 of the Voting Rights Act that blacks have an opportunity to elect a candidate of their choice.

To be of their choice, it would seem to be mathematically necessary that it be over a majority so that the "they" making a choice would be a majority, and then somewhat [*76] higher than that to account for the fact that blacks tend to be of a lower average age than whites because of both longevity and birth rates thus that the voting age population in the 1st District was 53.4 black, in the 12th District, 53.34 percent black, and also knowledge that black voter registration tends to lag behind whites and that black voting turnout tends to lag behind white. So all of those require the number to be somewhat higher than 50 percent.

Q So that—

A (interposing) We felt that--to finish answering the question, we felt that these numbers met the requirements of Section 2.

Q Is there a requirement in Section 2, an explicit requirement, that there be a majority--the creation of a majority minority district?

A My understanding from having read the Act and the House and Senate Conference Committee documents is that yes, reading all those documents together.

Q That was the---

A (interposing) That is the legal interpretation that I have based my actions answering--getting the result and answering your question, yes.

Q And so then you proceeded--now, were you in turn instructed this was a requirement or was this something you formulated on your own as to the--in other words, you say [*77] what you construed Section 2 to mean and that it required the creation of the type of majority minority district you have just indicated?

A I think it was, described without violating any privileges, a common statement that was I believe made and accepted by all of the persons on various sides participating in the legislative deliberations, that in order for minorities to have an opportunity to elect a candidate of their choice, as we understood Section 2 to require, that it had to be over a majority.

Q Did the Justice Department indicate that that was their interpretation?

A Certainly from their actions, yes.

Q And the Justice Department indicated by their actions and otherwise that they would not approve--that is, not preclear under Section 5 unless there was a creation of two majority minority districts?

* * *

[*188] Q Are there any minority concentrations, in particular urban blacks, that could have been put into District 12 because of proximity to District 12, but rather were split off into an adjacent district?

A Not of any majority. I mean, there are some precincts that are in a, you know, 25 to 30 percent black area that are on the fringe of the black community that are not in the 12th District, but no--none of the core of any black community, no. And you are talking about the counties that are in the 12th District in the enacted plan?

Q I am talking---

A And your question was, was anything divided in any of those counties that wasn't put in the majority black district, in the counties that were divided in the 12th District?

Q My question is, are there any minority concentrations, such as were there any urban blacks put into Congressman Neal's district?

A Not substantially. As I have testified, there are some precincts that are, you know, I think 25, 30-some percent black in Winston-Salem that remained in the 5th [*189] District. But the majority black precincts in Winston-Salem, the core of the urban black community, the most urban part of Winston-Salem as opposed to some suburban areas, were put in the 12th District. I mean, not every black voter in Winston-Salem is in the 12th District.

Q But---

A So to that extent, there was certainly division, but not every--you know, there is a core of precincts in Winston-Salem that are 98 to 100 percent black. That core of the community is all in the 12th District. But areas that were, you know, 25 to 33 percent black that aren't in the core of the black community were not necessarily in the 5th District, to speak specifically about Forsyth County.

Q Well, were the precincts that had significant--and by "significant" I would view 20 percent, in that range, as significant. Were there precincts that ended up in Neal's district that were originally in the 12th District in the Peeler plan?

A No, none of Forsyth County was in the 12th District in the Peeler plan. Would it help if I pointed to you on the map Forsyth County in the Peeler plan? This is Forsyth County in the Peeler plan (indicating). None of the 12th District is in it.

(Counsel confer.)

Q Mr. Cohen, at any juncture in the legislative [*190] process between the submission of the Peeler plan, the promulgation of the Peeler plan and the passage of Chapter 7, did you draft a plan that put minority concentrations in Winston-Salem that are now in the Neal district into District 12?

A Yes.

Q And why were they subsequently removed from District 12?

A To help increase--to make the stated goal of increasing the majority black percentage. If you are trying to--mathematically if you are trying to build a district that is 56 to

57 percent black, it doesn't help that goal to have a number of precincts that are 33 or 40 percent black.

Q But weren't those 33 or 34 percent or 40 percent black precincts sufficiently urban? Weren't they urban?

A Yes, they were urban, but there were areas elsewhere--I do not remember--I think there were maybe three or four precincts that were changed between--one of the sort that I describe as interim. There were a number of plans in the record in between the Peeler plan and the enacted plan that had three or four more precincts.

And you are still working on the goal of increasing the urbanness of the district and increasing the majority percentage black so that it was as high or higher than the first district that was rejected in Chapter 601. And those [*191] precincts were removed because they were less than majority black in a district where the goal was to have a number that was 56 or 57 percent.

Q So in effect, the principal motivation was not urbanness, but blackness?

A The principal motivation for taking those precincts out; is that your question---

Q (interposing) Yes.

A ---or the principal motivation for what?

Q For taking those precincts out of District 12.

A I am not really sure on the particular density of those particular precincts. I mean, precincts that are 20 to 30 percent black tend to be less dense than precincts that are 80, 90, 100 percent black because they tend to be very heavily concentrated, urban, often public housing, with very high densities, whereas precincts that are 20 to 30, 35, 40 percent

black are precincts that tend to be more suburban in nature and less population dense.

Now, I will also say that another factor--you asked if that was the only factor? What was your question again? Did you ask previously what was the reason?

Q Is there a difference in a community of interest between urban blacks and suburban blacks?

A No, but to the extent that changes resulted in more urban blacks--I believe that some of the changes may [*192] have been to add more black precincts, black areas in Charlotte to the district. And to the extent the changes simply put urban blacks in one county in and took urban blacks in another county out--it is the extent that maybe suburban blacks were taken out in one county and instead urban blacks were put in in another district that fostered that goal.

I am not testifying whether suburban or urban blacks have or don't have similar interests. I am saying that there were two different goals, increase urbanness and increase the black percentage, and---

DEPOSITION TRANSCRIPT OF GERRY COHEN IN *POPE V. BLUE*, 3:92-CV-71-P (EXCERPTS)

[*99] Q Assume you're a white Republican in the Chambersberg precinct in the Twelfth Congressional District –

A Yes.

Q What chance do you have of having someone who you identify with or support politically being elected in any congressional election during the next ten years?

Ms. Smiley: Objection to the form of the question and the content of the question.

A In any congressional district, there's going to be 45 percent of the people who are not black, roughly, and I refuse to accept any implication that a black legislator is less able to represent a white legislator – white constituent.

Q That wasn't my implication. If it was, I apologize. Let me rephrase it.

A Okay.

Q What chance does that white Republican have of electing a Republican candidate in the Twelfth District in the next eight years?

A Well, since the purpose of the Voting Rights Act is to allow minorities to elect a candidate of their choice that whatever minority districts there would be that there would be a corresponding less [*100] likelihood that a white candidate would have the – white would have an opportunity to elect a candidate of their choice. So the answer is nil. It has nothing to do with the characteristics of the Twelfth District. It has to do with the characteristics of the Voting Rights Act.

Q So would you agree that this white Republican in the

Chambersberg precinct that's in the Twelfth District that he might as well – there's no reason for him to vote for the next eight years for Congress, is there?

A I disagree with that entirely.

Q He can't have any effect on the election, can he?

A I don't think there's any voter that has no effect on an election. I think any congressman is responsive to the needs of his or her constituents. And I don't think that that voter will be ignored by the member of congress simply because of his or her race – the fact that that person is white.

Q Do you agree that there's very little, if any, chance of a Republican being elected in the Twelfth District?

A There is very little chance of a Republican being elected from any – there is very little chance of a white Republican being elected from any of the **[*101]** minority districts whether they be one or two in any proposed plan the General Assembly has considered, could consider, or any court could consider – that that is the purpose of the Voting Rights Act to – now if black voters would chose – now let me rephrase that – it's to allow black voters to elect a candidate of their choice. If the black voters wanted to elect a Republican candidate, they could. I note that in the Twelfth District, the candidates filed to date – either two, three or all three of those candidates are black.

Q Mr. Cohen, historically have not blacks voted in North Carolina about 90 percent Democrat?

A Yes.

Q So if voting trends continue, it's very unlikely that we'd have a black Republican nominated in the – or to win in the Twelfth Congressional District, would you agree with that?

A Unless the Democrats nominated a white, I would say yes, in that district.